

**ONTARIO PUBLIC SERVICE
LABOUR RELATIONS TRIBUNAL
DECISIONS**

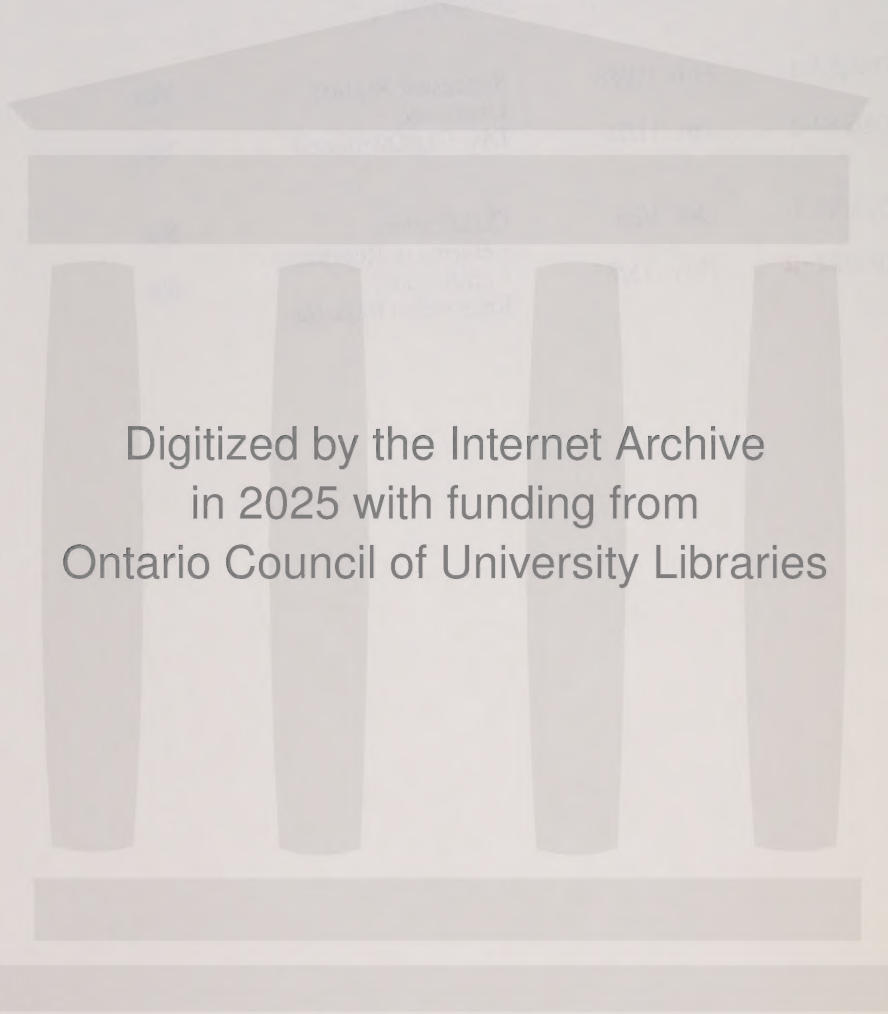
**ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL
DECISIONS**

1984 Volume 2

T/0051/84 - T/0088/84

File No.	Date	Type and Disposition	Indexed
T/0054/84	June 14/85	Employee Status; Allowed	No
T/0055/84	Jun. 24/88	Employee Status; Allowed	Yes
T/0057/84	Sept. 21/87	Employee Status; Dismissed	Yes
T/0058/84	May 28/86	Referred to Divisional Court	No
T/0058/84-2	Nov. 30/89	Employee Status; Allowed	Yes
T/0064/84	Sept. 20/88	Employee Status; Dismissed	Yes
T/0064/84-2	Jul. 13/89	Certification; Interim	Yes
T/0065/84 - see T/0055/84			
T/0066/84	Apr. 14/88	Employee Status; Allowed	Yes
T/0071/84	May 14/85	Bargaining Author- ity; Allowed	Yes
T/0076/84	May 22/87	Duty of Fair Representation; Dismissed	Yes
T/0078/84	June 14/85	Employee Status; Allowed	No

File No.	Date	Type and Disposition	Indexed
T/0081/84	July 25/85	Employee Status; Dismissed	No
T/0084/84	Jan. 7/85	Religious Objection; Dismissed	Yes
T/0086/84-1	Feb. 10/88	Successor Rights; Dismissed	Yes
T/0086/84-2	Jan. 11/89	Div. Ct.; Dismissed	Yes
T/0088/84-1	Oct. 3/85	Certification; Referred to Registrar	No
T/0088/84-2	Nov. 15/85	Certification; Referred to Registrar	No



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Ontario Public Service

Labour
Relations
Tribunal

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Tribunal Administratif
des Relations
du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/595 3001

T/54/84

B E T W E E N :

Canadian Union of Public Employees
Local 1750

Applicant

- and -

The Crown in Right of Ontario
(The Workers' Compensation Board)

Respondent

B E F O R E :

Owen B. Shime, Q.C., Chairman
E.C. Witthames and
J.H. McGivney, Q.C., Tribunal
Members

A P P E A R A N C E S :

Mr. Grenville Jones, and others,
for the applicant

Ms. B. J. Bowlby, and others,
for the Respondent

H E A R I N G :


June 6, 1985

This is an application under section 40(1) of the Crown Employees Collective Bargaining Act to determine whether John Hastings, who is Co-ordinator of Promotion Services at the Workers' Compensation Board, and Mrs. L. Barone, who is a Production Co-ordinator at the Workers' Compensation Board, are employees within the meaning of the Act.

Having regard to the evidence and the submissions of the parties and, for the reasons given orally at the hearing, the Tribunal determines that Mr. John Hastings is an employee in a managerial capacity within the meaning of the Act. Accordingly, he is not an employee within the meaning of the Crown Employees Collective Bargaining Act.

Having regard to the evidence and the submissions of the parties and, for the reasons given orally at the hearing, the Tribunal determines that Mrs. L. Barone is an employee within the meaning of the Crown Employees Collective Bargaining Act.

DATED at the City of Toronto this 14th day of June,
1985.



Owen B. Shime, Q.C.
for the Tribunal



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416/598-0688

T/55/84

T/65/84

Crown Employees Collective Bargaining Act

R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
(Ministry of the Attorney General)

Respondent

Before:

Pamela C. Picher - Chair
J.H. McGivney - Member
E.C. Witthames - Member

For the Applicant:

E. Shilton-Lennon
Counsel
Cavalluzzo, Hayes & Lennon
Barristers & Solicitors

For the Respondent:

D.W. Brown
Counsel
Crown Law Office Civil
Ministry of the Attorney General

Hearing:

January 22, 1988

DECISION

Two applications were filed by the Union under section 40(1) of the **Crown Employees Collective Bargaining Act**, R.S.O. 1980 c.108 (**C.E.C.B.A.**) which provides as follows:

40. (1) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Tribunal and its decision thereon is final and binding for all purposes.

The first application (file no. T/55/84), requests the Tribunal to determine whether clerks, bailiffs and other staff who work in the Ontario Small Claims Court are employees within the meaning of section 1(1)(f) of **C.E.C.B.A.** In the second application (file no. T/65/84), the Union asks the Tribunal to determine whether regular and casual court interpreters are employees under **C.E.C.B.A.**

I

CLERKS, BAILIFFS AND STAFF EMPLOYED IN THE SMALL CLAIMS COURT:

A. ISSUES Re CLERKS/BAILIFFS/COURT OFFICE STAFF:

Section 1(1)(f) of **C.E.C.B.A.** provides that,

1. (1) In this Act,

...

- (f) "employee" means a Crown employee as defined in the **Public Service Act** but does not include,

[a list of ten exclusions are then set out which have not been put is issue in this proceeding]

The **Public Service Act**, R.S.O. 1980 c.418 defines "Crown Employee" in section 1(e) as,

1. In this Act,

...

- (e) "Crown Employee" means a person employed in the service of the Crown or any agency of the Crown ...

The Union maintains that the clerks, bailiffs and staff of the Small Claims Court are "crown employees" as defined in the **Public Service Act** and, therefore, are employees for the purposes of **C.E.C.B.A.** The Ministry, on the other hand, argues that the clerks and bailiffs of the Small Claims Court are independent contractors, not employees of the Ministry of the Attorney General and, therefore, are not employees under **C.E.C.B.A.** It is the further position of the Ministry that certain staff employed in the Small Claims Court are the employees of the clerks and bailiffs, not the Ministry, and thus, as well, do not fall within the definition of "employee" under **C.E.C.B.A.** For the purposes of this application, the Ministry does not suggest that the clerks, bailiffs or staff of the Small Claims Court would be covered by any of the ten exclusions to employee status listed in subsections (i) through (x) of section 1(1)(f) of **C.E.C.B.A.**

B. FACTS Re CLERKS/BAILIFFS/COURT OFFICE STAFF:

Prior to the hearing, the parties drew up an Agreed Statement of Fact. The

Statement and related exhibits and legislation are extensive but may be summarized as follows:

- 1.. The Ontario court system is established by the **Courts of Justice Act**, 1984, S.O. 1984 c.11, as amended (hereinafter referred to as the "**C. of J. Act**").
2. The **C. of J. Act** (sections 77-78) establishes a single court of record with jurisdiction over civil actions where the amount of money at issue is relatively small, generally under \$1,000.00. The single court is called the "Provincial Court (Civil Division)" and is also known as the "Small Claims Court".
3. The **C. of J. Act** (section 91) stipulates that the Attorney General shall superintend all matters connected with the administration of the Provincial Court (Civil Division) or Small Claims Court, as well as the other courts in the system.
4. The **C. of J. Act** (section 94) provides that court administrators, interpreters, and such other employees as are considered necessary for the administration of the courts in Ontario may be appointed under the **Public Service Act**.
5. The **C. of J. Act** (section 85) stipulates that there shall be a Rules Committee of the Provincial Court (Civil Division) composed of members appointed by the Lieutenant Governor in Council.

The appointments to the rules committee are made on the recommendation of the Ministry of the Attorney General.

The Rules Committee has enacted a comprehensive series of rules governing procedure in the Provincial Court (Civil Division).

Section 85 further provides that the Rules Committee for the Provincial Court (Civil Division) may make rules in relation to the practice and procedure of the court and among other matters the duties of clerks and other officers.

6. The **C. of J. Act** (section 86) stipulates that there shall be a clerk and one or more bailiffs for each division of the Provincial Court (Civil Division) who shall be appointed by the Lieutenant Governor in Council.

The clerks and bailiffs may be assisted by deputy clerks and bailiffs who are appointed on approval by the Deputy.

- 7.. The **C. of J. Act** (section 87) stipulates that the Lieutenant Governor in Council may make regulations among other matters prescribing the duties of the clerks and employees of provincial courts or any class of such employees. Any such regulations would be drafted by the Ministry of the Attorney General.

8. The daily operation of the Provincial Court (Civil Division) is performed and/or supervised by the clerks and bailiffs. There are 119 territorial divisions of the Court and each clerk is put in charge of a court office located in one of the 119 divisions. Each bailiff is in charge of the service and enforcement of processes within a division.
9. The Attorney General has delegated authority for court administration. The person with direct responsibility for administering the Provincial Court (Civil Division) is the "Director".
10. The clerks and bailiffs are chosen by the Director or his staff and are then formally appointed to their positions by the Lieutenant Governor in Council. Their appointments can and will be revoked if they fail to meet standards set by the Ministry of the Attorney General.
11. Clerks and bailiffs are assisted by deputy clerks and bailiffs who are initially approved or rejected by the Director, who are then appointed by the Lieutenant Governor in Council and whose appointments can and will be revoked if the individuals fail to meet the standards set by the Ministry of the Attorney General.
12. The standards set by the Ministry of the Attorney General fall into two categories:
 1. Rules of the Provincial Court (Civil Division);
 2. Financial and personnel management regulations and guidelines.
13. The Rules established by the Rules Committee for the Court require that clerks and bailiffs perform certain duties.
14. The Ministry of the Attorney General has published a detailed Manual which elaborates on the rules and sets out what must be done to fulfill those duties in the form of policies, practices and procedures to be followed by all the court offices.

The Manual is regularly revised and updated by directive memos issued by the Director to the clerks and bailiffs.
15. The Ministry of the Attorney General supplies all the court forms and other related stationery to all the court offices; these are the forms that must be used. A periodic audit of the court offices is done to, among other matters, ensure that the procedural Manual is being followed. The results of the audit are forwarded to the Director. The Director forwards a copy to the clerk of the relevant court office along with directions for improvement if performance is inadequate.
16. Regulations under the **C. of J. Act** which are drafted by the Ministry of the Attorney General require and authorize that litigants be charged a set fee for taking certain steps in the course of an action. These fees are

retained by the clerks and bailiffs and are used to finance the operation of the offices.

17. Two types of financial arrangements have developed and the court offices have been labelled according to which financial arrangement they are under. There are fee courts and salary courts.

- a) **Fee Courts:** All wages for people who operate the fee court offices (clerks, bailiffs, deputies etc.) are paid out of the fees and allowances authorized and collected pursuant to the regulations drafted by the Ministry of the Attorney General.

The clerks and bailiffs in a fee court office may spend the collected fees and allowances as they see fit and they may hire staff to assist them in running the court office. When staff is hired the clerk sets the salaries and benefits payable to the staff.

If the income is insufficient to cover the promised salaries of the staff the resulting problem is that of the clerk and bailiff. The Ministry of the Attorney General will not supply additional funds. The result is that the wages of fee court staff are typically lower than in salary courts.

Office equipment in a fee court office is not supplied by the Ministry of the Attorney General. It is paid for out of the collected fees and allowances.

Rent is paid for out of the fees and allowances as well unless the court office is in a government building.

- b) **Salary Courts:** Salary courts exist in most of Ontario's major metropolitan centres. They typically employ more staff than fee courts.

The salary courts operate under the fee and allowance regulations but the wages of the clerks and other staff are set by the Ministry of the Attorney General. If the fees and allowances collected by the salary court office are insufficient to pay the wages, the Ministry of the Attorney General will subsidize the court.

Some bailiffs in the salary court offices are on salary and some operate on the "fee court" basis.

The Ministry of the Attorney General assigns the salary court employees to classifications equivalent to those under the Clerical Services category under the relevant collective agreement and guarantees they will receive the same wage rates.

The clerks and bailiffs administer their offices in accordance with the relevant provisions of the Ministry of Attorney General Policies and Procedures Administration Manual.

A clerk in the salary court offices may fill new positions after he gets approval from the Director. The Director sets the classification and salary range for new positions.

The bookkeeping for salary courts is done in accordance with the regulations and the procedures established in the Manual published by the Ministry of the Attorney General.

All purchases and expenditures in Salary Court offices are requisitioned through the Ministry of the Attorney General and subject to its approval.

The Ministry of the Attorney General has long intended to bring the salary court offices into the public service and the provisions of the **C. of J. Act** provide for this eventuality.

18. Because of the control exercised by the Ministry of the Attorney General over the operation of the court offices, all salary court office clerks and bailiffs and many fee court clerks and bailiffs consider themselves to be employees of the Ministry of the Attorney General. Some fee court office clerks and bailiffs consider themselves self-employed. Many fee court office employees consider themselves employed by the clerk or bailiff in their office.

C. SUBMISSIONS Re CLERKS/BAILIFFS/COURT OFFICE STAFF:

It is the position of the Ministry that all the clerks and bailiffs are independent contractors. Counsel for the Ministry maintains that the clerks and bailiffs run their own businesses. Counsel submits that in the fee courts in particular the clerks' and bailiffs' opportunity to generate income is in direct proportion to their ability to do the job and the efficiency with which they manage their court offices.

Counsel for the Ministry argues that the controls that are placed on the clerks and bailiffs through legislation, rules and uniform policies and procedures are primarily designed to promote the public interest by creating universality and uniformity in the court system, particularly in such matters as fees and forms. Counsel maintains that the controls imposed by legislation for universality in the administration of justice

should be distinguished from the traditional control tests that have been used to distinguish employees from independent contractors.

With respect to the court office staff, counsel for the Ministry maintains that the persons employed by the clerks and/or bailiffs in the fee courts are employees of those clerks and/or bailiffs, not the Ministry. Counsel emphasizes that the clerks in the fee courts hire the staff, establish their salary levels and duties and have the authority to dismiss them.

Counsel for the Union disputes that the clerks and bailiffs are independent contractors and argues that by any of the traditional tests established in the jurisprudence they are employees. Counsel further maintains that the staff in fee courts are employees of the Ministry.

D. PRINCIPLES FOR DISTINGUISHING EMPLOYEES FROM INDEPENDENT CONTRACTORS:

In **Algonquin Tavern**, [1981] OLRB Rep. (Aug.) 1057, the Ontario Labour Relations Board was required to determine whether burlesque dancers in certain hotels and taverns were employees or independent contractors. In setting out the principles applicable to distinguishing the two categories, the OLRB referred to both the **control test** and what has come to be known as the **fourfold test**. At p.1067, the Board stated:

38. A second, and somewhat more sophisticated approach, (and one which has been used by this Board in a number of cases) is the so-called "fourfold test" referred to by Lord Wright in **Montreal v. Montreal Locomotive Works Limited**, [1947] 1 D.L.R. 161 (P.C.) At page 169, his Lordship comments:

"In earlier cases a **single test**, such as the presence or absence of **control**, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a **fourfold test** would in some cases be more appropriate, a complex involving (1) **control**; (2) **ownership of the tools**; (3) **chance of profit**; (4) **risk of loss**. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. ...

This test is helpful in many situations; but it is not without its faults. As the Board noted in **Livingston Transportation Limited**, [1971] OLRB Rep. May 488:

"While the fourfold test is helpful in most situations, and notwithstanding that the Board has indicated that all four tests must be satisfied to determine whether a person is an independent contractor, **Cima Limited** [1963] OLRB Rep. May 100 at 102; **Nicks Haulage Limited**, [1970] OLRB Rep. Nov. 871, there are cases where its application lends itself to artificiality. In many cases the evidence weighs heavily in perhaps one or two of the categories but does not weigh heavily in either the third or fourth. In some situations there is strong evidence in one or more categories with no evidence in another category. How then is one to apply the test where the weight of the evidence in two categories suggests one type of relationship, whereas the weight in the other two categories suggests another form of relationship?"

[emphasis added]

Because of the limitations and artificiality resulting from a strict application of the fourfold test from **Montreal Locomotive Works**, the OLRB in **Livingston Transportation**, *supra*, isolated from Lord Wright's judgement in **Montreal Locomotive**

Works a further approach to distinguishing employees from independent contractors, which was to ask **whose business was being carried on**, the individual's or the employer's. At pp 490-491 the OLRB stated the following:

7. The third approach and one which has often been overlooked was also referred to by Lord Wright in the **Montreal v. Montreal Locomotive Works Ltd.** case, *supra*. After referring to the fourfold test Lord Wright made the following statement:

" In many cases the question can only be settled by examining the whole of the various elements which constitutes the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking **whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.**"

The application of that test, i.e., asking whether the business is being carried on for himself or for his superior, may lead to different results from those suggested by the application of the fourfold test. However, it is an approach that in many situations commends itself.

[emphasis added]

The **organization test** is a further approach which has found favour in numerous jurisdictions and was applied both by the OLRB in **Algonquin Tavern** and this Tribunal in **Canadian Union of Public Employees, Local 3096 and Crown in the Right of Ontario (North Waterloo Housing Authority - Ministry of Housing)**, file no. T/21/85 dated March 20, 1987. In **Algonquin Tavern**, the OLRB described the organization test as follows at pp 1067-1068:

39. A third approach suggested by the latter part of Lord Wright's decision in **Montreal Locomotive**, and later developed by Denning L.J. in a series of cases, is the so-called "**organization**" or "**integration**" test, in which the question becomes: "does the alleged servant form part of the alleged master's organization". ...

In **Bank voor Handel en Scheepvaart N.V. v Slatford**, [1953] 1 Q.B. 248, he remarked (at 295):

"The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization".

[emphasis added]

In its decision in **Re North Waterloo North Housing Authority**, *supra*, the Tribunal noted that the organization test has been endorsed by the Ontario Court of Appeal in **Mayer v. J. Conrad Lavigne Ltd.** (1979), 27 O.R. (2d) 129 which adopted the following description of the organization test from Fleming, **The Law of Torts**, 2nd ed. (1961), at pp. 328-9:

Was the alleged servant part of his employer's organization?
Was his work subject to co-ordination control as to 'where' and 'when' rather than the 'how'?

Lord Denning in **Stevenson Jordan & Harrison, Ltd. v MacDonald et al.**, [1952] 1 T.L.R. 101, referred to by Fleming, said this:

"One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an **integral part of the business**; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is **only accessory to it**."

[emphasis added]

In **Algonquin Tavern and Livingston Transportation Limited**, the OLRB further highlighted what they termed the "**statutory purpose test**". At pp. 1068-1069 the OLRB described this approach as follows:

40. A final approach, - much relied upon by the applicant in this case, - is the so-called "**statutory purpose test**". This approach involves the (fairly obvious) proposition that in applying the Act, and in selecting and weighing the factors which point towards one interpretation or the other, the Board should take into account the concerns underlying the legislation. As the United States Supreme Court stated in **N.L.R.B. v Hearst Publications Inc.**, (1944), 322 U.S. 111:

"The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors". Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within the Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other depending upon the weight of this balance and its relation to the special purpose at hand.

Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. ... In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relations make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes

unrelated to the statute's objectives and bring the relation within its protections."

[emphasis added]

After the OLRB reviewed the various tests it distilled factors which it considered particularly relevant to distinguishing employees from independent contractors. At pp. 1082 - 1084 the OLRB listed the following 11 factors:

64. From this survey of the legal landscape, and the special environment of the entertainment industry, we can now attempt to distil some of the features which individually [sic], or in combination, have been relied upon to support a finding of independent contractor status. It is recognized of course, that a listing such as this must necessarily be somewhat artificial. The factors are interrelated, and one is often only the converse of the other. No one factor, in itself, will be significant. **However, all of these matters** were mentioned or relied upon in one or more of the cases to which we have already referred and, if present, **support a finding that an individual is 'self employed':**

1. **The use of, or right to use substitutes.** It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour rather than one's own work and skill. This is significant, however, only to the extent that it is the alleged employee who makes that decision.
2. **Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials.** These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual's own labour. On the other hand, reliance upon another's financial loss on capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.
3. **Evidence of entrepreneurial activity.** This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop 'clients', the use of agents, and organizing one's 'business' (by incorporation or

otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a 'chance of profit' or 'risk of loss'; that is whether business acumen sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.

4. **The selling of one's services to the market generally.** If the purchasers of individual's services are numerous and of diverse character, the individual looks more like an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a 'dependent' contractor or employee -- especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his 'prime customer' is given priority.
5. **Economic mobility or independence, including the freedom to reject job opportunities, or work when one wishes.** Of course, few independent contractors are entirely free in this regard, but the question is one of the degree. A 'self-employed' person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has 'tied his fortunes'.
6. **Evidence of some variation in the fees charged for the services rendered.** This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as 'independent contractors', and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser's ability to pay, may indicate independent contractor or self employed status.
7. **Whether the individual can be said to be carrying on an independent business' on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been**

integrated in to the operating organization of the employing unit. Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and 'place' of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer's organization. In the case of entertainers, the cases suggest that it may also be useful to determine the extent to which the artist's material or co-workers are influenced by the employer; that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered 'integrated' into the employer's operation in the manner of an employee, if he is required to devote the whole of his working time during the period to the service of the employer, promote its organization, or fill in his 'non performing' time with unrelated ancillary duties. (See: Whittaker, supra.)

8. **The degree of specialization, skill, expertise or creativity involved.** If these are dominant element in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of 'integration' into the respondent's organization, the disputed individual is 'self-employed' professional.
9. **Control of the manner and means of performing the work — especially if there is active interference with the activity.** However, it is the right to interfere rather than the ability to do so which is significant. The fact that a particular control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship at will and without cause may indicate an employment relationship whether or not the employer exercises this power.

10. **The magnitude of the contract amount, terms, and manner of payment.** If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be 'employees'; and independent professionals may charge an hourly rate rather than a block fee).
11. **Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.** The employer's established employee complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. If the so-called independent contractor substitutes for a firm's employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee.

Six approaches emerge from the lengthy jurisprudence regarding the appropriate means of distinguishing employees from independent contractors:

1. The control test;
2. The fourfold test: a) control; b) ownership of tools; c) chance of profit; and d) risk of loss;
3. The Whose Business Is It test;
4. The Organization test;
5. The Statutory test;
6. The Algonquin List.

Some of these tests are overlapping, particularly as traditional approaches have matured to meet the ever-increasing sophistication of the work place in a highly technological age. Often, no single question or test will be determinative. Moreover, in a given context, some questions and/or some tests may not be particularly helpful, one way or the other. The most constructive approach is to consider the relationship in issue from several of the angles highlighted in the tests, whichever seem most applicable to the factual context at hand. This was precisely the approach taken by the Tribunal in **Re Waterloo Housing Authority** and the one which we adopt in this case to determine (1) whether the clerks and bailiffs working in the Small Claims Court are employees of the Ministry of the Attorney General or, instead, are independent contractors and (2) whether the staff in the fee courts are employees of the Ministry or employees of the clerks and bailiffs.

E. DECISION *Re* CLERKS AND BAILIFFS:

Applying the **organizational test** endorsed by the Ontario Court of Appeal in **Mayer v J. Conrad Lavigne Ltd., supra**, there is little doubt that the clerks and bailiffs are highly integrated into the Ontario court system which is superintended by the Attorney General and his delegates. Recalling the words of Lord Denning in **Stevenson Jordan & Harrison Ltd., supra**, their work is an "integral part" of the Small Claims Court system, which strongly suggests the status of employee. They are not "only accessory to it". The clerks are in charge of the court offices in the 119 territorial divisions of the Small Claims Court and the bailiffs are in charge of the services and enforcement of processes within the respective divisions. Together they run and supervise the daily operation of the Small Claims Court. Without their services the Courts wouldn't operate. They are the center of the operation, not accessory to it.

Moreover, they are under control as to "where" and "when" they do their work. They work when and where the rules and policies established by the Ministry of the Attorney General dictate. Unlike a typical independent contractor they do not have the flexibility to do their work on their own time, in their own place and simply bring it in when it is finished. As set out in more detail below their work is tightly controlled by the Ministry of the Attorney General. Measured by the standard of organizational integration it is clear that the clerks and bailiffs are not independent contractors performing a contract for services but rather are employees under a contract of service.

Answering the question of "**Whose Business Is It?**", (which is also part of Item #7 of the **Algonquin** list), yields the same results as the organization test. The **C of J Act** establishes the Ontario court system and charges the Attorney General with the responsibility for superintending all matters connected with the administration of the Small Claims Court, as well as other courts. The **C of J Act** stipulates that there shall be a clerk and one or more bailiffs for each division of the Small Claims Court. These legislative stipulations make it abundantly clear that when clerks and bailiffs discharge their responsibilities in running the court offices, they are not carrying on their own businesses but rather are enabling the Ministry to fulfill its legislative mandate.

We look now to some of the relevant factors highlighted in the **Algonquin** list. The clerks and bailiffs **cannot freely substitute** (item #1) others to perform their services. They are chosen by the Director (or his staff) of the Small Claims Court who is the person to whom the Attorney General has delegated his authority for administering the Small Claims Court. They are then appointed by the Lieutenant Governor in Council. Although they may be assisted by deputy clerks and bailiffs they too are approved by the Director and appointed by the Lieutenant Governor in Council.

Given this framework of appointment, the clerks and bailiffs are not free to bring in substitutes to replace themselves in the performance of their work. The staff that may be hired directly by clerks and bailiffs in the fee Courts are utilized to assist the clerks and bailiffs in carrying out their responsibilities. They are not their substitutes.

The clerks and bailiffs do not **sell their services to the market generally** (item #4 of the **Algonquin** list). On a full-time basis they run their assigned court offices for the Ministry of the Attorney General. The clerks and bailiffs are not presented with an array of job opportunities from numerous and diverse purchasers of their service. They have one "purchaser" in the form of the Ministry of the Attorney General who has charged them with responsibility for running the various court offices. Recalling item #5 of the **Algonquin** list, the clerks and bailiffs **do not exhibit economic independence** and/or the freedom to reject job opportunities. A bailiff is not entitled to refuse to serve a summons on a witness on the ground that he doesn't need the work at that point.

The Ministry of the Attorney General exercises **substantial control** (item #9 of the **Algonquin** list and part of the fourfold test) over the manner and means by which the clerks and bailiffs perform their work. The Ministry sets the standards under which the Small Claims Courts operate. Section 85 of the **Courts of Justice Act** stipulates that there shall be a Rules Committee composed of members appointed by the Lieutenant Governor in Council. The appointments to the Committee are made on the recommendation of the Attorney General. The rules established by the Rules Committee require that the clerks and bailiffs perform certain duties. The Ministry of the Attorney General has published a detailed Manual which elaborates the rules and sets out policies and procedures that must be followed by all the court offices in providing

their services. This degree of control is required to enable the Province to provide a uniform system of justice and not one that fluctuates with the personalities, whims, skills and motivation of the individual clerks and bailiffs. The clerks and bailiffs are not at liberty to establish their own policies and procedures to enhance service as they see fit. They must follow the dictates set by the Rules Committee and published in the Manual. Moreover, the court forms are standardized and supplied by the Ministry. There is minimal freedom for the clerks and bailiffs regarding how they perform their work. The scope for creativity is tightly limited. Using the words of item #3 on the **Algonquin** list, there is little evidence of **entrepreneurial activity**.

The inability of the clerks and bailiffs to establish their own rules and procedures for running and providing the services of the court offices is highlighted by the fact that the court offices are audited periodically to ensure, among other matters, that the procedural Manual is being followed. When the Director receives the results of the audit he or she notifies the clerk of the relevant court office about the need to improve if the performance is inadequate in a given area. If individual clerks and bailiffs fail to meet the standards set by the Ministry of the Attorney General or fail to follow required procedures their appointments to those positions can and will be revoked. Recalling the language used in item #9 in the **Algonquin** list, **the Ministry has the "right" to interfere** with the manner in which work is performed and impose sanctions where necessary. Moreover, the Director determines the office hours. The clerks and bailiffs must work 36-1/4 hours per week. As well, vacation credits are earned according to the standards set in the Manual.

The fourfold test established in **Montreal Locomotive Works Ltd.** sets out four factors for consideration: 1) control; 2) ownership of tools; 3) chance of profit and 4)

risk of loss. The Tribunal has already detailed the high degree to which the work of the clerks and bailiffs is controlled by the Ministry of the Attorney General, particularly through the rules and procedures established by the Rules Committee and set out in the Manual. The remaining three factors in the fourfold test carry some significance for the clerks and bailiffs in the fee courts because of the financial arrangement under which they work. The clerks and bailiffs in both types of courts (fee courts and salary courts) earn fees for the court offices by the services they perform for the public users of the courts. For example, the clerk is paid a fee of \$23.15 upon the filing of a claim where the claim exceeds \$1,000; \$10.00 upon filing of a notice of motion; \$1.10 for issuing a summons to witness; \$5.50 for issuing a writ of delivery; \$44.10 for preparing and filing a consolidation order, and the list goes on and on. Similarly the bailiffs are paid \$2.20 for serving a summons to witness; \$6.60 for enforcing a writ of delivery or a writ of seizure and sale of personal property; \$11.00 for enforcing a warrant of committal and the list continues. These fees do not constitute wages for the clerks and bailiffs but rather monies out of which their wages are paid.

The clerks and bailiffs in the salary courts are paid wages set by the Ministry. In the fee courts, however, the wages of the clerks and bailiffs are not set. They budget their own court offices. From the fees brought in by the performance of their services they pay the wages of any staff they've hired to help them; they buy office supplies and furniture and they pay rent. Their wages are paid out of what is left. To some degree, then, they are subject to a "chance of profit" and "risk of loss". That chance of profit and risk of loss depend in part on the ability of the clerks and bailiffs to organize their court offices and to work efficiently. On the other hand, a ceiling is imposed by the volume of work generated by the district in which their court

offices reside. Given the nature of the judicial system, the clerks and bailiffs await the work. The work comes to them from the public users of the court. They do not go out in the community to sell their services and encourage people to file claims so that they can be paid a fee for the service. Moreover, it is not the nature of the judicial system that the users will choose one court over another on the basis of the skill and efficiency with which particular clerks and bailiffs perform their work. Given these substantial limitations on the scope for "chance of profit" and "risk of loss" and having regard to the numerous other factors which point directly to employee status as opposed to status as independent contractors, as discussed above, we conclude that even in fee courts the clerks and bailiffs carry the status of employees.

Having carefully assessed the work of the clerks and bailiffs from the perspective of the various relevant tests, the Tribunal is fully satisfied that the clerks and bailiffs in both the fee courts and salary courts are not independent contractors; rather they are employees within the meaning of section 1(1)(f) of **C.E.C.B.A.** Of particular importance in drawing this conclusion is (1) the high degree of control exercised by the Ministry of the Attorney General over the manner, the means, the when, and the where of the performance of their work, (2) the extent to which the clerks and bailiffs are fully integrated into the Small Claims Court system and respective court offices rather than accessory to it/them, and (3) the fact that they cannot be seen as entrepreneurial or as running their own businesses; rather their work is in the service of the Crown.

F. DECISION Re STAFF:

We turn now to consider the status of the staff hired by the clerks and bailiffs

in the fee courts to determine whether they are employees of the Ministry of the Attorney General or of the respective clerks and bailiffs for whom they work.

In **Sutton Place Hotel**, [1980] OLRB Rep. (Oct) 1538 the Ontario Labour Relations Board addressed the issue of the appropriate test for identifying the employer. At pp. 1552-3 it stated the following:

26. In **York Condominium Corporation**, [1977] OLRB Rep. Oct.645, the Board isolated seven factors to assist it in determining which of two or more entities is the employer for the purposes of **The Labour Relations Act**. At page 648 the Board listed the seven criteria:

- (1) The party exercising direction and control over the employees performing the work. ...
- (2) The party bearing the burden of remuneration. ...
- (3) The party imposing discipline. ...
- (4) The party hiring the employees. ...
- (5) The party with the authority to dismiss the employees. ...
- (6) The party which is perceived to be the employer by the employees. ...
- (7) The existence of an intention to create the relationship of employer and employees. ...

In **York Condominium** the Board did not attribute relative priorities to the various criteria but rather considered how each in turn applied to the particular facts before it and came to a decision based on the preponderance of evidence.

...

41. A look at the jurisprudence highlights the wide variety of factual combination that present themselves in cases where the Board is called upon to identify the employer. It is apparent on review that no one of the seven criteria set out in **York Condominium** is determinative in all cases. In **G.E.M.** and **Alwell Forming**, for

example, the company which hired the employees was not found by the Board to be the employer. In **Ralston, Tower Company, Board of Internal Economy** and **Templet**, on the other hand, the entity responsible for hiring was found to be the employer. In **Ralston, Board of Internal Economy** and **G.E.M.** the entity supervising the employees on a day-to-day basis was found to be the employer while in the **Tower Company** and **Boeing of Canada** it was not. In **Templet** and **G.E.M.** the company paying the wages was found to be the employer. In the **Board of Internal Economy** it was not. In **Ralston** and for some employees in **Alwell Forming** the board concluded that the company from whose account the wages were drawn was not the entity which actually bore the burden of remuneration. In **Ralston** and **Alwell Forming** the group which bore the burden of remuneration was identified as the employer, and in **Board of Internal Economy** it was not. In **G.E.M.** and **Alwell Forming** the Board's finding was consistent with the perception of the parties. In **Kent Line Ltd.** this would appear not to have been the case.

...

43. The weight to be accorded the various indicia of employer status set out in **York Condominium** cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.
44. **A particularly important question answerable through an evaluation of all of the factors set out in York Condominium is who exercises fundamental control over the employees.** In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in **York Condominium** inevitable points to the possession of fundamental control. **The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question** in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of **The Labour Relations Act**.

[emphasis added]

Having carefully assessed the facts and the submissions of the parties, the Tribunal concludes that the staff hired by the clerks and bailiffs in the fee courts are employees within the meaning of section 1(1)(f) of the **C.E.C.B.A.** Although the clerks may actually hire the staff and set their wages, the seat of fundamental control over their work rests with the Ministry of the Attorney General.

As detailed above, the duties and responsibilities of the clerks and bailiffs, the manner in which they perform these duties, the time and place of the performance of their work as well as the cost to the public of these services are tightly controlled by the Ministry and are set down in the form of rules and procedures which must be followed. The staff brought in by the clerks and bailiffs to assist them are no less subject to the controls of the Ministry's rules and procedures than are the clerks and bailiffs. The clerks and bailiffs are circumscribed in the directions that they may give the staff. If the staff do anything contrary to the rules and procedures published in the Manual and such is discovered in a periodic audit and related to the Ministry's Director, the Director will notify the court office about the problem and direct adherence to the appropriate rules and procedures.

On balance, then, the Tribunal concludes that the staff in the fee courts are employees of the Ministry, just as are the clerks and bailiffs themselves, notwithstanding that the clerks may hire the staff and set their wages. We draw this conclusion because, on balance, the fundamental control over their work is held by the Ministry.

II

COURT INTERPRETERS

We turn now to the second application and the determination of the employee status of the regular and casual court interpreters.

A. ISSUES Re COURT INTERPRETERS:

There are three kinds of interpreters used in the Ontario courts:

- a. **"Staff" interpreters:** They are full-time employees of the Ministry of the Attorney General and appointed to the public service. To date, there are 8 in Ontario and they are all permanently engaged in the translation of French. They are salaried employees of the Ministry, members of OPSEU and subject to the relevant collective agreement. The staff interpreters are not in dispute in this proceeding.
- b. **"Regular" interpreters:** They are full-time employees of the Ministry of the Attorney General but not appointed to the public service. They are not members of the union and receive no entitlement under the collective agreement.
- c. **"Casual" interpreters:** They are employed less than full time by the Ministry of the Attorney General. They are not members of the union and have no entitlement under the collective agreement.

The issue before the Tribunal is whether the regular interpreters and casual interpreters are Crown employees. The parties agree that the issue of how much less than full time the casual interpreters work is not material to the determination of whether they are Crown employees. It may, however, be relevant to whether they may be excluded from the **C.E.C.B.A.** even though they are employees. Section 1(1)(f)(vi) of the **Act** stipulates that an "employee" under the Act does not include,

"a person not ordinarily required to work more than one third of the normal period for persons performing similar work except where the person works on a regular and continuing basis" ...

Whether the casual interpreters might fall within this exclusion is an issue the parties have agreed to put aside, pending the broader determination of whether interpreters who work less than full time are Crown employees. As stated by counsel for the Ministry, whether the casuals work one day a month or four days a week is not important at this point. In the circumstances, then, the Tribunal will consider the employee status of the casual interpreters on the basis that they work "somewhat less than full time". Any diminution beyond the commitment of a person who works somewhat less than full time is a matter that may subsequently be addressed on a case by case basis.

B. FACTS Re COURT INTERPRETERS:

Prior to the hearing the parties drew up an Agreed Statement of Fact which may be summarized as follows:

- a. The **C. of J. Act** (section 91) stipulates that the Attorney General shall superintend all matters connected with the administration of the Provincial Court (Civil Division) or Small Claims Court, as well as the other courts in the system.
- b. The Attorney General has delegated authority for the administration of the Court, in part, to the Court Services branch of the Court Administration Division of the Ministry of the Attorney General including interpreter services. The coordinator of Court Interpretation and Translation Services is directly responsible for the interpreter services.
- c. Section 94 of the **C. of J. Act** provides that court interpreters may be appointed under the **Public Service Act**.
- d. The provision of interpreters in criminal cases and coroner's inquests is the responsibility of the Crown Attorney pursuant to section 5(2) of the **Administration of Justice Act**, R.S.O. 1980, c.6.

In such cases the interpreter is paid in accordance with what the Crown Attorney considers reasonable out of moneys appropriated by the Legislature for the administration of justice.

- e. The **C. of J. Act** provides for the provision of interpreters (s.135). Section 95 stipulates that interpreters shall act at the direction of the chief justice or chief judge of the court. Interpreters must also swear an oath to truly and faithfully discharge their duties.
- f. In November 1985, Interpretation Services introduced a system for the registration and testing of all existing and future interpreters.
- g. The Ontario courts utilize the three types of interpreters: staff interpreters (who are not in issue), regular interpreters and casual interpreters.

h. **Regular Interpreters:**

- 1. They are full-time employees of the Ministry of the Attorney General.
- 2. Some work exclusively for the Ministry (mainly those working at one of the Metropolitan Toronto or area courts). Some, with the permission of the Ministry of the Attorney General, make their services available to other clients as well.
- 3. Regular interpreters who work exclusively for the Ministry are required to be at the designated court 6-1/2 hours a day, 5 days a week.

They are paid for that period whether or not their services are required on any given day.

- 4. Regular interpreters are paid one hourly rate for their first hour and another rate for their subsequent hours. Their average hourly rate is much lower than the wages paid to staff interpreters. They receive no benefits. They do receive travel expenses where applicable.
- 5. The failure of either class of regular interpreters to attend at court on a regular basis will result in the interpreter's name being removed from the list.
- 6. At times, regular interpreters are requested to travel to courts in areas other than where they normally work. When they go they must sign out of their usual court. The failure or repeated failure of a regular interpreter to accept an assignment to travel to another court will result in the interpreter's name being struck from the list of regular interpreters.
- 7. Regular interpreters' fees are paid out of the budgets of the receiving courts.
- 8. For audit purposes the regular interpreters complete daily attendance forms. Every five days a clerk of the court office will calculate the interpreter's billable hours and prepare an invoice which is validated

by the office supervisor and usually signed by the interpreter. The invoice is then processed through the accounting section of the court office.

9. Every month 2 or 3 regular interpreters are assigned the function of scheduling regular interpreters to trial, or where a regular interpreter is not available, of contacting a casual interpreter. The schedule is placed in the Court interpreters' offices. Unscheduled requirements for interpreters also arise.
- i. **Casual Interpreters:**
1. They work on an on-call basis.
 2. Failure to be available will result in the interpreter's name being removed from the list and will jeopardize his or her future appointment as a regular interpreter. Casual interpreters are not restricted from working elsewhere, when their services are not needed in court.
 3. Casual interpreters are paid cash on a daily basis for services received that day. A log is maintained for recording accumulative payments to interpreters for T-4 purposes.
- j. The Ministry provides all court interpreters with an equipped office at all Metro Toronto court locations.
- k. Because of the hourly rates paid, because of the allowance disbursements, because of the active role of the Ministry in registering and testing court interpreters, because of the sanctions the Ministry can invoke against interpreters and because of the amount of work supplied by the Ministry all regular interpreters employed exclusively by the Ministry and most of the other regular interpreters consider themselves to be employees of the Ministry.

C. SUBMISSIONS Re COURT INTERPRETERS:

It is the position of the Ministry that the regular and casual interpreters are independent contractors, not employees. Counsel for the Union, on the other hand, argues that by any of the recognized tests both groups of interpreters are employees. Counsel argues that the very fact that the regular interpreters are described in the

agreed facts as full-time employees of the Ministry reveals that they are Crown employees.

D. DECISION Re REGULAR COURT INTERPRETERS:

The Tribunal is readily satisfied that the regular interpreters are employees within the meaning of section 1(1)(f) of **C.E.C.B.A.** and not independent contractors. One group of regular interpreters works full time and exclusively for the Ministry. They are required to attend at their designated courts 6-1/2 hours a day, five days a week and are paid regardless of whether they are actually called upon to provide interpretation services. They are fully subject to the direction and control of the Ministry and bear none of the hallmarks of independent contractors as highlighted in the various tests which, as set out above, include (1) the Control test; (2) the Fourfold test; (3) the Organizational test; (4) the Whose Business Is It test; or (5) the **Algonquin** List. To the contrary they exhibit all the earmarks of employees.

The Tribunal is further satisfied that the other group of regular interpreters who may, with the permission of the Ministry, make their services available to other clients are also employees for the purposes of section 1(1)(f) of **C.E.C.B.A.** It is a stipulated fact that notwithstanding that they may make themselves available to other clients, they work full time for the Ministry. Accordingly, it may be assumed that the vast bulk of their work is tied to a single employer. We conclude that they may be deemed to be dependent on the Ministry for the major portion of their livelihood, although they may supplement their income with some extra work. Such dependency on a single employer is indicative of employee status rather than that of an independent contractor. Their status as employees is further heightened by the fact that even when

they engage in work for clients other than the Ministry they must have the permission of the Ministry to do so. Moreover, these interpreters are paid by the hour as opposed to by the job. While the method of payment is not necessarily determinative, being paid an hourly rate is certainly consistent with employee status.

Further highlighting their status as employees is the fact that the second group of regular interpreters, like the first, is advised where they will work and when they will work. As well, s.95 of the **C. of J. Act** stipulates that the interpreters shall act at the direction of the chief justice or chief judge of the court. Accordingly, the independent discretion that may be exercised by the interpreters in the manner in which they perform their tasks is tightly circumscribed. If the second group of regular interpreters (just like the first) fail to attend on a regular basis their names are removed from the list of interpreters. As well, failure, or repeated failure, of these regular interpreters to travel to other courts to perform work when requested so to do will result in their removal from the job. Accordingly, their discretion to accept or reject work is far less than would be characteristic of an independent contractor. Furthermore, from the perspective of the organizational test, the evidence reveals that notwithstanding that work may be performed for other clients, all these regular interpreters are an integral part of the Ontario justice system and not simply accessory to it. Having regard to all the foregoing, the Tribunal is readily satisfied that all the regular interpreters, including those who with the permission of the Ministry are entitled to make their services available to other clients, are employees within the meaning of section 1(1)(f) of **C.E.C.B.A.**

E. DECISION Re CASUAL INTERPRETERS:

We turn then to the casual interpreters who work on a call-in basis. In their

agreement on the facts, the parties have stipulated that the casuals work less than full time but that how much less is not relevant at this point.

We conclude from the facts placed before the Tribunal that the casual interpreters are also employees and not independent contractors. The agreed statement of fact stipulates that the failure of the casual interpreters to be regularly available for work will result in their removal from the list of interpreters and will jeopardize their ability to obtain full-time appointments as regular interpreters. Their freedom to accept or reject work is thus more limited than would normally be expected of an independent contractor. Moreover, the casual interpreters are just as restricted as the regular interpreters in the degree to which they can exercise independent judgement in the manner in which they perform their work. Pursuant to section 95 of the **C of J Act** they also act at the direction of the chief justice or chief judge of the court. There is nothing in what the casual interpreters do or how they do it which is sufficiently different from the regular interpreters to provide an appropriate basis upon which to differentiate their legal status from that of the regular interpreters. The regular interpreters work full time and the casual interpreters work part time. "Casual" may be a misnomer in the sense that the representations of the parties indicate that some could work as often as 3 or 4 days a week. Part-time work in and of itself does not create an independent contractor or undermine employee status. When a person works part-time for an employer, the individual may or may not be an employee depending on the nature of the employment relationship. In this case, the evidence of the employment relationship for the casual interpreter reveals the status of employee.

Having regard to the accepted tests for distinguishing employees from independent contractors, the Tribunal is satisfied on the basis of the evidence that the casual interpreters are employees within the meaning of section 1(1)(f) of **C.E.C.B.A.** Whether any casual interpreters might further fall within an exclusion from employee status based on the exception in section 1(1)(f)(vi) of the **Act** is a matter which may be addressed at a later date and is an issue upon which we make no determination at this point.

To summarize the conclusions of the Tribunal we find in response to the Union's applications under section 40(1) of **C.E.C.B.A.** that,

1. the clerks and bailiffs of the fee courts and salary courts are employees within the meaning of section 1(1)(f) of **C.E.C.B.A.** and are not independent contractors;
2. the staff of the clerks and bailiffs in the fee courts are employees within the meaning of section 1(1)(f) of **C.E.C.B.A.** and are not the employees of the clerks and bailiffs;
3. all regular interpreters are employees within the meaning of section 1(1)(f) of **C.E.C.B.A.** and are not independent contractors; and
4. casual interpreters are employees with the meaning of section 1(1)(f) of **C.E.C.B.A.** and are not independent contractors.

DATED at Toronto this 24th day of June, 1988.



Pamela C. Picher
Chair
FOR THE TRIBUNAL

Crown Employees Collective Bargaining Act, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/57/84

BETWEEN:

Ontario Public Service Employees Union
(James Atwood et al)

Applicants

- and -

The Crown in Right of Ontario
(Ministry of Health)

Respondent

BEFORE:

J.H. Devlin, Vice-Chairman

M. Sullivan, Member

J.H. McGivney, Member

FOR THE UNION:

T. Hadwen
Counsel
Cavalluzzo, Hayes & Lennon
Barristers & Solicitors

FOR THE EMPLOYER:

W.J. Gorchinsky
Director
Staff Relations Branch
Human Resources Secretariat
Management Board of Cabinet

HEARINGS:

May 7 and 22, 1987

This is an application brought by the Employer pursuant to Section 40 of the Crown Employees Collective Bargaining Act to determine whether James Atwood and six other individuals employed as Ward Supervisors at the Oak Ridge Unit of the Mental Health Centre at Penetanguishene are employees for purposes of the Act. It is the position of the Employer that Ward Supervisors are employed in a managerial capacity and, therefore, are not employees within the meaning of the Crown Employees Collective Bargaining Act. In particular, the Employer relies on Sections 1.-(1)(1)(iii) and (iv) of the Act which provide as follows:

"1.-(1) In this Act,

...

(1) 'person employed in a managerial or confidential capacity' means a person who,

...

(iii) spends a significant portion of his time in the supervision of employees,

(iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,"

It is the position of the Union that Ward Supervisors do not spend a sufficient portion of their time exercising independent discretion characteristic of persons

employed in a managerial capacity and that there is no conflict between performance of the duties of Ward Supervisor and membership in the bargaining unit.

The Oak Ridge Unit, formerly the Hospital for the Criminally Insane, is a maximum security facility which provides forensic psychiatric treatment. The Unit houses approximately 200 patients including individuals referred for assessments as to sanity and those who have been found not guilty by reason of insanity. The Unit contains seven wards, each housing approximately 30 patients and is staffed twenty-four hours a day, seven days per week.

The Chief Attendant at the Oak Ridge Unit, which is a position excluded from the bargaining unit, reports to the Director of Nursing who in turn reports to the Administrator. Reporting to the Chief Attendant are five Area Supervisors who are also excluded from the bargaining unit. Each Area Supervisor is responsible for co-ordinating the activities of two Wards on the day shift or eight Wards on the afternoon shift. Reporting to the Area Supervisors are seven Ward Supervisors who are classified as Attendants 4 and are the subject of the application before the Tribunal. Below the Ward Supervisor are 33 Senior Attendants classified as Attendants 3 and approximately 120 Attendants who are classified as either Attendants 1 or 2.

Evidence concerning the job of Ward Supervisor was introduced in the form of a job description dated April 4th, 1984, which was acknowledged to be reflective of the duties of the position at the time of the Employer's application in December of 1984. In addition, oral evidence was given by James Atwood and Donald Cruise both of whom were then classified as Attendants 4.

The job description which was introduced in evidence describes the purpose of the position of Ward Supervisor in the following manner:

"To assume responsibility for the administration and provision of practical nursing care to a ward housing up to thirty-eight patients in the Oak Ridge Unit. To ensure that all safety and security measures of the Oak Ridge Unit are maintained when relieving the Chief Attendant during weekends, statutory holidays, and other specified times."

The duties of the Ward Supervisor fall into two main categories, the first of which may be described as clinical, involving supervision of the daily nursing care program on the ward. Duties in this category including escorting the doctor on rounds, assigning staff to special duties, investigating reports of patient misbehaviour or altercations and reporting these to the Area Supervisor and attending conferences to provide input on patient progress or regression. Mr. Atwood and Mr. Cruise testified that they

are members of an inter-disciplinary team involved in patient treatment and that they gather information concerning patients on the ward which they provide to other members of the team for purposes of patient assessment.

The second category of functions performed by the Ward Supervisor is described on the job description as administrative ward duties. These include duties relating to therapeutic and security procedures on the ward and also involve the exercise of certain responsibilities of a supervisory nature. In respect of these latter duties, substantial oral evidence was given by Mr. Atwood and Mr. Cruise. This evidence reveals that Ward Supervisors are responsible for assigning duties and preparing work schedules and time sheets for Attendants on the wards to which they are assigned. They also have responsibility for authorizing casual time off although, in so doing, the Ward Supervisor must contact the front office to determine if the Unit is adequately staffed. In the event that an employee is unfit when he reports to work or is taken ill during the course of his shift, the Ward Supervisor may send the employee home although, again, the front office must be advised to ensure that adequate staffing levels are maintained. In circumstances where an Attendant does not report for work, the Ward Supervisor contacts the front office to obtain additional staff. With regard to vacation leave, Mr. Atwood testified that this has been approved at both the ward level

and on a unit-wide basis and as he recalled, vacations were approved in this latter manner in December of 1984.

The Ward Supervisor is also responsible for orienting new Attendants to the ward and conducting performance appraisals of subordinate staff. Mr. Atwood testified that he does not review these appraisals with his immediate Supervisor although he acknowledged that he might do so in the event of a particular problem. While the Employer has established guidelines for these appraisals, Mr. Atwood testified that it is necessary to provide his own assessment and to meet with the individual employee. The performance appraisals are then forwarded to the Chief Attendant and thereafter to the Personnel Department.

As Ward Supervisors, both Mr. Atwood and Mr. Cruise have sat as members of selection panels and although neither has chaired such a panel, they have provided input into the selection process. Mr. Cruise testified that he has also recommended employees for promotion and transfer. In addition, Mr. Atwood suggested that he has authority to recommend that an employee be retained or terminated at the completion of his probationary period. Mr. Atwood also testified that he could make recommendations which would have the effect of denying or accelerating the payment of a merit increase.

Although Ward Supervisors have responsibility for the administration of the collective agreement on each ward, it was acknowledged that this does not apply to all aspects of the agreement. By way of example, Mr. Atwood agreed that he has no responsibility for the posting provisions set out in the collective agreement. Mr. Atwood and Mr. Cruise have both issued verbal discipline and Mr. Cruise testified that a Ward Supervisor can issue written discipline and recommend other disciplinary action as he deems necessary. Although Mr. Atwood and Mr. Cruise both testified that they have responsibility for the first step of the grievance procedure, no grievances have been filed which have actually required them to fulfill this responsibility.

Ward Supervisors also attend certain management meetings and Mr. Atwood and Mr. Cruise testified that these meetings involve discussion of hospital policies, changes affecting ward staff and have, at times, involved discussions concerning problems relating to particular staff members.

Although Ward Supervisors generally work from Monday to Friday on the day shift, they are also in charge of the Unit on weekends. For the individual Ward Supervisor, this generally occurs every fourth to sixth weekend. At this time, approximately 40 employees report to the Ward Supervisor who is the senior officer on site. On occasion, the Ward Supervisor also fulfills this responsibility on the

afternoon shift on an overtime basis during the week. When the Ward Supervisor is in charge of the Unit, a member of management is on call and although there are a number of different codes of procedure to be followed in the event of an emergency, both Mr. Atwood and Mr. Cruise testified that they are responsible for responding to the situation on site. Mr. Cruise also suggested that activation of the various codes does not always automatically result in a call being made to a member of management. On weekends, Ward Supervisors are also responsible for authorizing overtime and have authority to call in staff.

The issue, then, is whether Ward Supervisors are employees within the meaning of the Crown Employees Collective Bargaining Act. The duties which are clinical in nature as well as a number of the administrative duties performed by Ward Supervisors involving ensuring compliance with therapeutic and security procedures on the ward are not managerial in nature and it was not suggested that these duties alone would require exclusion from the bargaining unit. There are, however, a number of supervisory duties performed by Ward Supervisors involving varying degrees of responsibility. In some cases, Ward Supervisors simply recommend action to their superiors as occurs in the case of transfers, promotions, discipline beyond a written reprimand or the action to be taken upon completion of an employee's probationary period. In these circumstances and while the

input of the Ward Supervisor may be considered, the ultimate decision rests with senior management. At the same time, Ward Supervisors do impose verbal or written discipline, conduct employee performance appraisals and grant casual time off. Although in the latter case, in most instances contact must be made with the front office, we do not view this as detracting from the Ward Supervisor's responsibility for authorizing the absence. In a facility such as the Oak Ridge Unit, certain staffing levels must be maintained and the front office provides a means by which this may be accomplished on a unit-wide basis.

While the responsibility of Ward Supervisors for administration of the collective agreement on the ward is limited, to a large extent, this may result from the nature of the organization in which Ward Supervisors are employed. In this respect, it is useful to consider the remarks of another panel of the Tribunal in Ontario Public Service Employees Union (Bethell) and The Crown in Right of Ontario File No. 9/76 to the following effect:

"Like many modern industries, the organization of the Government of Ontario has become highly complex and bureaucratic and its sheer size has resulted in numerous people exercising a very wide variety of specialized skills. Rarely does one find any single individual exercising the full range of management duties and responsibilities. The nature and size of government as an employer requires it to be consistent in the application of its policies with the

result that many of its practices are centralized, particularly as they affect employee relations. For example, in the Government of Ontario it is one of the functions of Management Board and its staff to ensure that all employees are treated with an even hand and thus it attempts to develop and implement consistent policies throughout the Ontario public service.

In recognition of the fact that the functions performed in different Ministries may require that they possess the capability to approximately modify or even, on occasion, to deviate from centrally developed themes, there is usually a separate personnel department or officer within each Ministry who is required to develop appropriate policies, and practices which provide for consistency within the Ministry. These attempts to achieve consistency among and within the Ministries have resulted in a highly regulated system of employee relations. Clearly, both the Government as a whole and the individual Ministries have attempted to prevent a patchwork system of industrial relations from developing.

Moreover the system of regulation has become tighter because of the existence of collective bargaining. Thus, in the Government of Ontario, there is one collective agreement covering working conditions and this reduces the scope of discretion which once existed as the sole prerogative of management.

The result of all of these regulatory forces has, by and large, stripped first line management of its traditional roles. A first line supervisor no longer hires or fires. He has little if any input into the collective bargaining process, promotions are governed by the provisions of the collective agreement as are rates of compensation and fringe benefits."

In this case, the Employer has sought to exclude Ward Supervisors from the bargaining unit on two grounds, one of which is found in Section 1.-(1)(1)(iv) of the Crown Employees Collective Bargaining Act which provides that a person is employed in a managerial or confidential capacity when he is required by reason of his duties to deal formally on behalf of the Employer with a grievance of an employee. Although Ward Supervisors apparently have responsibility for responding to grievances at Step 1, this is not a function which has actually been performed by either Mr. Atwood nor Mr. Cruise nor was there evidence that this responsibility has actually been performed by any other Ward Supervisor. In these circumstances, we would be most reluctant to find that Ward Supervisors are employed in a managerial capacity as provided in Section 1.-(1)(1)(iv) of the Act.

The second ground upon which the Employer has sought to exclude Ward Supervisors from the bargaining unit is contained in Section 1.-(1)(1)(iii) of the Crown Employees Collective Bargaining Act which provides that a person is employed in a managerial capacity when he spends a significant portion of his time in the supervision of employees. In this case, Ward Supervisors engage in both professional supervision, involving matters relating to the work of the ward, and

also in managerial supervision. Again, however, we would be reluctant to exclude Ward Supervisors from the bargaining unit solely on the basis of the supervisory duties which they perform from Monday to Friday on the day shift. While some of these duties reflect a measure of independent discretion consistent with that of a person employed in a managerial capacity, in a number of instances, the responsibility appears to be no greater than that which would be exercised by an individual in the capacity of a lead hand or working foreman. What tips the balance in favour of the Employer, however, are the duties and responsibilities exercised by Ward Supervisors on weekends and during the week on an overtime basis. On weekends, there are some 40 employees reporting to the Ward Supervisor who also has responsibility for authorizing overtime and calling in staff. Moreover and despite the fact that a member of senior management is on call, as indicated by Mr. Atwood and Mr. Cruise, the Ward Supervisor has responsibility for responding to an emergency on site. Given the nature of the facility, this responsibility may well call for the exercise of independent discretion and initiative. In this respect, the situation is not dissimilar from that in Ontario Public Service Employees Union (Bethell) and The Crown in Right of Ontario, supra which was relied upon by the Employer. In that case, Mr. Bethell was employed as a Correctional Officer 4 at

the Ottawa-Carleton Detention Centre and on a number of occasions was required to replace the supervisor in charge of the maximum area. In these circumstances, he was also in charge of the institution and, on this basis, was found to be employed in a managerial capacity.

Although Ward Supervisors are not regularly in charge of the Oak Ridge Unit on a daily or even a weekly basis, nevertheless, we are satisfied that this responsibility is exercised with sufficient frequency so that in combination with other duties referred to previously, it must be concluded that Ward Supervisors are employed in a managerial capacity. They are not, therefore, employees for purposes of the Crown Employees Collective Bargaining Act.

DATED AT TORONTO, this 21st day of September, 1987.

J. H. Devlin

J.H. Devlin
Vice-Chairman

"I dissent" (see attached)

M. Sullivan
Member

J. H. McGivney

J.H. McGivney
Member

This matter has been outstanding since 1984 and was being dealt with by another panel before Chairman Shine who is now with the G.S.B. This prompted another complete hearing.

The application brought by the employer is to exclude 7 positions which are presently in the bargaining unit represented by the Ontario Public Service Employees Union.

It becomes extremely important in this decision to determine the level of direct personnel supervision VISA VI other related duties. In the position specification for the position of Ward Supervisor it is apparent that many other duties are relevant to this position and that nursing and or patient care programs and seminars are on the average 55% of each work day.

Administrative duties are estimated to be 40% of the work day, however, only a minor portion of that time is spent on personnel matters.

Mr. Atwood testified that he has sat on selection panels although neither he nor Mr. Cruise has chaired such a panel. Mr. Atwood testified that he could "recommend" an employee be retained or dismissed at the completion of his probation period.

Although Mr. Atwood could "recommend" the above he is not responsible for such. Any decision on hiring or termination falls within the scope of the Chief attendant (Mr. Atwoods supervisor).

Mr. Cruise and Mr. Atwood also testified that as Ward Supervisors, they have "never" issued any written disciplinary action. Both men attend staff meetings which involve a number of topics; ie. Policy changes, changes in various acts, Patients and on occasion problems relating to specific staff members.

In the absence of Mr. Atwood another staff member may attend these meetings.

The final issue that Chairperson Devlin addresses is the week-end supervision of the Oak Ridges Unit.

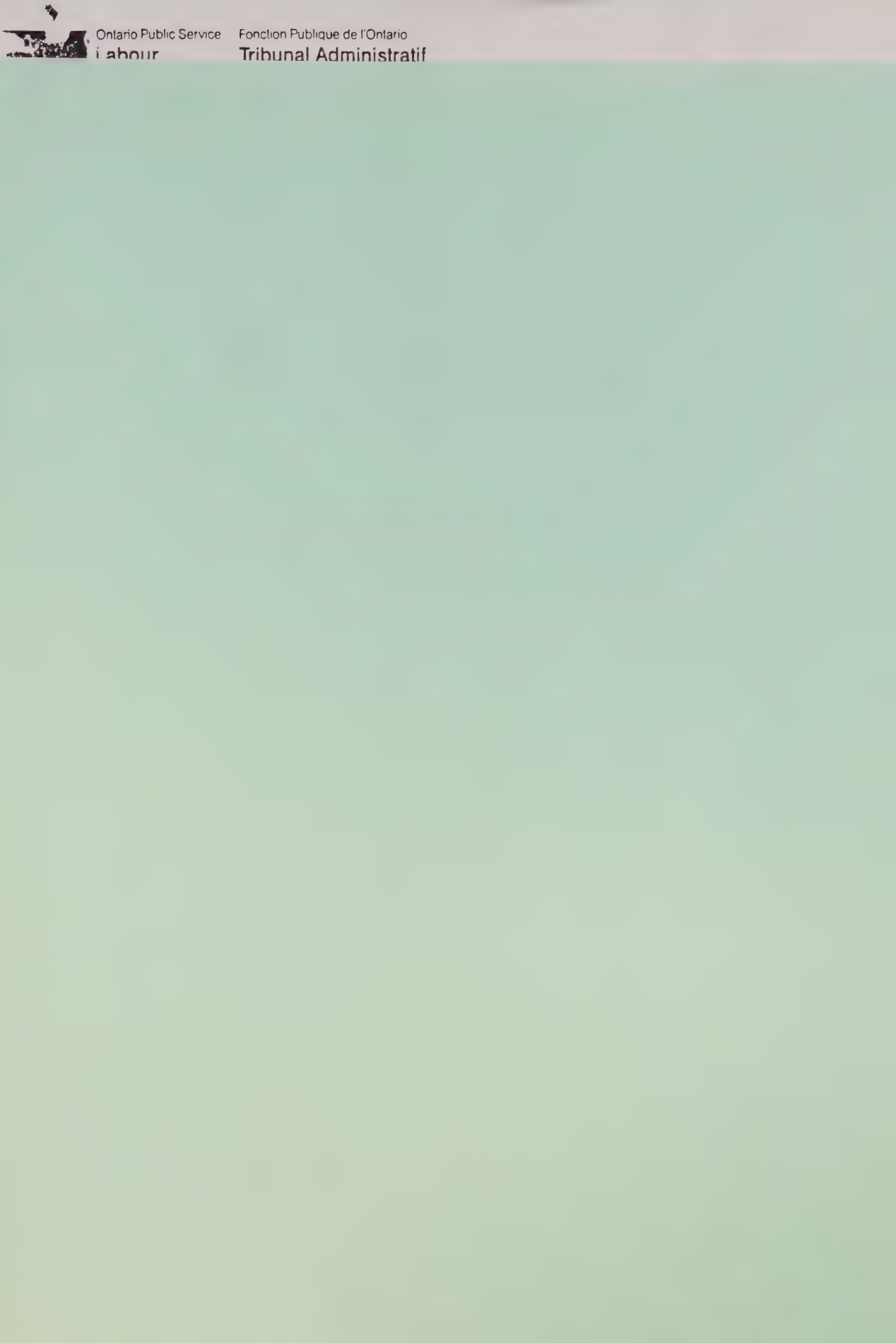
Chairperson Devlin suggests because of the frequency the Ward Supervisor is in charge of the Unit (every weekend) that the Ward Supervisor "may" have to authorize overtime and find replacements for workers that phone in sick and they "may" be responsible for any on site emergency that these circumstances would call for independent discretion and initiative. There is however a Senior Management person on call every weekend should a serious problem occur.

In conclusion, I would suggest that the employer has failed to justify the exclusion application on both grounds.

- 1) The Ward Supervisor has not dealt with any of the staff in regards to labour relations save and except a verbal warning to an employee.
- 2) That there is not a significant amount of time spent by the Ward Supervisor on personnel matters, that in fact the Ward Supervisor spends the major portion of his functions dealing with the patients in programs of recovery or Rehabilitation or corresponding with professional people such as Doctors.

I believe the employer has failed in his attempt to justify the exclusion of these 7 positions and therefore would have dismissed the application.


Member



Ontario Public Service
labour

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Tribunal Administratif



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T/58/84

B E T W E E N : Ontario Public Service Employees Union

Applicant

- And -

The Crown in Right of Ontario
(Ministry of Health and McKechnie Ambulance
Service Inc.)

Respondents

B E F O R E : P. Picher, Vice-Chairman
W. Walsh, Member
R. Gallivan, Member

F O R T H E U N I O N :

I. Roland
Counsel
Gowling & Henderson
Barristers & Solicitors

F O R T H E E M P L O Y E R :

D. Brown
Counsel
Crown Law Office Civil
Ministry of the Attorney General

And


P. Welland
Counsel
Messrs. Beard, Winter, Gordon
Barristers & Solicitors

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

D E C I S I O N

Pursuant to section 42 of The Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108, as amended, the Tribunal, upon the request of the parties, refers to the Divisional Court several questions of law, as more particularly set out in Appendix C attached hereto, which have been agreed to by the parties. Further set out herein are the facts which have been agreed to by the parties as being relevant to the determination of the questions of law.

DATED at Toronto, Ontario this 28th day of May, 1986.

A handwritten signature in dark ink, consisting of several loops and a long horizontal stroke at the end, positioned above a horizontal line.

P. Picher
For the Tribunal



Ontario Public Service
Labour
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Tribunal

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T/0058/84-2

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CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN: Ontario Public Service Employees Union
(the "Applicant")

AND: The Crown in the Right of Ontario
(Ministry of Health)
(the "Respondent")

AND: McKechnie Ambulance Services Inc.
(the "Intervenor")

BEFORE:

P.C. Picher, Chairperson
K.McDonald, Member
J.H. McGivney, Member

APPEARANCES

For the Applicant:
Ian Roland - Counsel
Gowling, Henderson

For the Respondent:
Dennis W. Brown - Counsel
Ministry of the Attorney General

For the Intervenor:
Peter M. Whalen - Counsel
Shibley, Righton & McCutcheon

Hearing: January 26, 1989

DECISION

The Ontario Public Service Employees Union, pursuant to section 40(1) of the Crown Employees Collective Bargaining Act, applied to the Tribunal for a determination of whether the employees of McKechnie Ambulance Service Inc. who are ambulance attendants are employees within the meaning of C.E.C.B.A. Section 40(1) provides as follows:

40. (1) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Tribunal and its decision thereon is final and binding for all purposes.

The parties agree that the issue of the employee status of the ambulance attendants turns on the determination of whether McKechnie Ambulance Services Inc. (hereinafter referred to as "McKechnie Ambulance") is a crown agency. They further agree that if McKechnie Ambulance is a crown agency then the ambulance attendants would be crown employees and would fall within the definition of "employee" under section 1(1)(f) of C.E.C.B.A. which provides as follows:

1. (1) In this Act,
...
 - (f) "employee" means a Crown employee as defined in the Public Service Act ...

The Public Service Act defines "Crown employee" as follows:

1. In this Act,
...

- (e) "Crown employee" means a person employed in the service of the Crown or any agency of the Crown, but does not include an employee of Ontario Hydro or the Ontario Northland Transportation Commission;

A. FACTS:

The following facts have been agreed to by the parties:

1. OPSEU is the collective bargaining agent for seven ambulance attendants employed by McKechnie Ambulance. OPSEU was certified as the collective bargaining agent by the Ontario Labour Relations Board on March 26, 1981.
2. McKechnie Ambulance is a privately held corporation incorporated under the laws of the Province of Ontario in or about the year 1981. The service was founded by Mr. John McKechnie in or about 1963 and was run as an unincorporated business from that time until in or about 1968, at which time it was operated under the name of John McKechnie Holdings Ltd. until in or about 1981. Mr. John McKechnie has operated this service in the Town of Collingwood, in the Province of Ontario, since in or about 1963 and has been a member of the Ontario Ambulance Operators' Association Incorporated since in or about 1965.
3. There are presently five types of ambulance services operated in the Province of Ontario. Ambulance services may be provided:
 - (a) by the Ministry of Health,
 - (b) by a hospital,
 - (c) by a municipality,

- (d) by a volunteer organization or
- (e) by an individual or corporation such as the respondent, McKechnie Ambulance.

The Ministry of Health (hereinafter referred to as "the Ministry") licenses all of the operators of ambulance services apart from the services provided by it. This application is only concerned with the licensed operator referred to in clause (e) above, McKechnie Ambulance.

4. In or about the year 1960, the Ontario Ambulance Operators' Association Inc. (hereinafter referred to as "Association") was formed. The Association was formally incorporated in or about the year 1963.

Prior to 1968, there were approximately 400 private ambulance operators doing business in Ontario. At the inception of the Association, John McKechnie, along with other ambulance service operators, was concerned about the disparity in ambulance services that were being provided across the province.

There were no common standards with respect to service levels, personnel training, equipment requirements, patient care, or other facets of ambulance service operations. As a result, in some areas of the province, normally in the larger metropolitan areas, service was rendered at an acceptable level. In some of the more remote areas of the province, the services provided were unsatisfactory, marked by the use of untrained ambulance attendants along with outdated vehicles and equipment. In most cases, payment was on a patient pay-by-the-call basis which made it difficult for the operators to collect their fees.

5. It was the intent of the Association to secure the creation of a central regulatory agency which would implement standards for all ambulance service operators in the province. In this regard, the Association recognized the need for a comprehensive scheme of licensing to ensure uniform and satisfactory service throughout the province.
6. Between 1968 and 1973, licensed ambulance services were not sold between licensed operators. During this time, an operator who wished to sell his service would contract with the Ontario Hospital Service Commission. Some of these services were later sold to licensed operators and others were later assumed by the Commission's statutory successor, the Ministry of Health.

Since 1973, licensed ambulance services have been bought and sold as business undertakings in the private sector. The purchaser is required to obtain a license from the Ministry to operate the service. Presently, seventy-one licensed operators in the province, including McKechnie Ambulance, operate ambulance services.

7. Under the Health Insurance Act all ambulance services rendered to insured persons are "insured services" and, accordingly, insured persons are entitled to have such services paid for by the Ministry on their behalf (which may be subject to a co-payment by the insured person). Under section 34 of the Health Insurance Act, R.S.O. 1980, c.197 and clause 6(1)(e) of the Ministry of Health Act, R.S.O. 1980, c.280 the amount payable by the Ministry to McKechnie Ambulance in respect of the insured services provided by McKechnie Ambulance are paid in the form of payment of "all or any part of the annual expenditures" of McKechnie Ambulance. The

payment for services provided is set out in clause 4(1)(f) of the Ambulance Act, R.S.O. 1980, c.20 and is more particularly described in paragraph 10 below.

8. In order to obtain its annual funding from the Ministry, each year McKechnie Ambulance submits an estimate of its projected expenditures in the following year for the provision of ambulance services. The estimate is reviewed by the Ministry and the Ministry determines the amount to be paid to McKechnie Ambulance during the following year. The total amount is provided to the operator in installments over the year and is subject to adjustment after the end of the year based on McKechnie Ambulance's cost of provided ambulance services in that year.
9. McKechnie Ambulance is liable for its own operating expenses. If it incurs expenses which exceed the amount paid by the Ministry, it must pay those expenses out of any money which it receives from other sources funded by the Ministry. If no funded monies are available, then McKechnie Ambulance must provide same itself.
10. For McKechnie Ambulance, the annual amount provided by the Ministry includes an amount to pay the cost of management of the service. The operator is free to engage management services from any source; in the case of McKechnie Ambulance, management is provided by John McKechnie himself. The amount to pay the cost of management (known as "the Management Compensation Plan") varies annually for McKechnie Ambulance according to its "call volume" - that is, the number of calls for ambulance services responded to by McKechnie Ambulance.

11. The previous collective agreement between McKechnie Ambulance and OPSEU expired on June 30th, 1984.
12. Schedule "A" of the most recent collective agreement between OPSEU and McKechnie Ambulance attached hereto as Appendix 2 provides that:

"It is understood between the parties that benefits and wage rates are subject to Ministry of Health approval and funding, however, implementation of benefits, wage rates and retroactivity will be completed on or before October 21, 1982".
13. The same provision requiring Ministry approval has existed in each of the previous collective agreements between the parties since 1980 and has been included in each collective agreement at the insistence of McKechnie Ambulance. Such conditional clauses are common in collective agreements between licensed ambulance operators and certified bargaining agents.
14. The current and predecessor directors of the Ambulance Services Branch of the Ministry and OPSEU have expressed their disapproval to McKechnie Ambulance and other licensed operators with respect to such conditional clauses. Nevertheless, in order to protect themselves against potential expenditures exceeding the amount payable by the Ministry, the operators, including McKechnie Ambulance, have continued to include such clauses in their negotiated collective agreements.
15. Attached hereto as Appendix 3 is a letter from Gordon Ventura, a former Director of the Ministry of Health's Ambulance Services Branch, to Owen Sound Emergency

Services Inc., indicating the Ministry's position with respect to such conditional clauses.

16. McKechnie Ambulance retains its own counsel and negotiates directly with OPSEU in order to agree upon all of the terms of the collective agreement.
17. The Ministry does not participate in the negotiations. However, it does provide information on the request of a licensed operator such as McKechnie Ambulance with respect to general funding limits.
18. McKechnie Ambulance hires, fires and disciplines its staff. In the event that McKechnie Ambulance wishes to hire staff in addition to the staff funded by the Ministry, McKechnie Ambulance is free to do so provided that the cost of the additional staff is underwritten by McKechnie Ambulance.
19. Attached hereto as Appendix 7 to this Agreed Statement of Facts is a letter from McKechnie Ambulance dated May 26, 1982. That letter provides as follows:

May 26th, 1982

Mr. Jim Lanktree, Union Steward
Mr. Carl Eichenberger
McKechnie Ambulance Service Inc.
411 Hurontario Street
Collingwood Ontario L9Y 2M7

Dear Jim and Carl:

Further to our meeting of Friday afternoon May 21st, 1982. I am now confirming the topics we discussed pertaining to our agreement. If you have any questions, or if the following does not pertain to our conversation I would appreciate if you would bring it to my attention. Should I

not have a reply from you by Friday May 28th, I will assume you are in agreement.

Item #1

I explained that just prior to our meeting I had a telephone conversation with Mr. Don Robinson. He advised me that he has not received any signed agreements from O.P.S.E.U., he has to have one for his files, plus is required to file one with the Ministry of Labour.

Item #2

My intentions are to commence our \$8.30 per hour salary schedule on June 3rd, 1982 also to pay the retroactive wages prior to the end of June 1982. If anyone should start their summer vacation prior to June 30th I would try to pay the retro-active along with his vacation pay.

Item #3

Correspondence from Ambulance Services Branch advising me that my 1980-81 settlement and my 1981-82 settlement had been approved. As of this date I still have not had any adjustments in my cash flow and have not received any cash flow schedules showing any settlement figures. Our present cash flow is on the amounts approved last year by A.S.B., as I have explained previously this figure is less than the budget I submitted, plus less than my actual expense for the year.

Any expenses beyond our control that exceeds percentage of budget increase have to be paid out of the overall operating figure. This expense has in the past and can still result in the salary and wage section being reduced by less than the overall percentage allowed.

Item #4

On January 28th, 1982 I sent a letter and our Memorandum of Agreement to Mr. Jon Hambides, Acting Regional Manager, Ambulance Services Branch. In my letter I referred to Item #8 in our Memorandum of Agreement. I explained the funding would have to be a decision of their department and I would reimburse my staff only when the adjustment was made in my cash flow. I am now advising you that I never received a reply to this letter, nor have I had any communication regarding this subject.

In order to make a further attempt to get an answer I have arranged a meeting with Mr. Fred Rusk, our Regional Manager. Our meeting is scheduled for Monday May 31st at 1:00 p.m., following this meeting I have arranged a meeting with Mr. Don Robinson on the same date at 4:00 p.m.

I plan on bringing Mr. Rusk up to date on our present situation, also explain and present to him their budget approvals, our budget submissions, plus our actual costs. I will then request from him a reply in writing advising me of their intentions. Following my meeting with Mr. Rusk I will then meet with Mr. Robinson and present to him an up to date report.

I trust I have explained my position on each subject we discussed. I have also tried to show where Mr. Robinson and I are trying to co-operate by having meetings on May 31st with Ambulance Services Branch.

Yours very truly,

"John McKechnie"
McKechnie Ambulance Service Inc.

[emphasis added]

20. Attached hereto as Appendix 8 to this Agreed Statement of Facts is a letter from McKechnie Ambulance dated June 28, 1982. That letter reads as follows:

June 28, 1982

Mr. Jim Lanktree
McKechnie Ambulance Service Inc.
411 Hurontario Street
Collingwood Ontario
L9Y 2M7

Dear Jim:

I am very pleased to advise you and all the staff that I have just received a letter from Mr. Fred Rusk, our Regional Manager. The letter is in reply to our meetings, plus my correspondence dated June 8th 1982.

It is now a pleasure for me to quote a portion of his letter dated June 22nd.

"Dear Jack:

Thank you for your letter of June 8th, 1982 requesting additional funding to meet your union contract.

I am pleased to advise that your request has been approved and your cash flow will be adjusted immediately."

Having this official reply on file I plan to adjust the salary scheduled to \$9.00 per hour commencing to-day June 28th 1982. The pay period ending July 3rd 1982 will be on the revised salary schedule. If at all possible I plan on paying the retroactive prior to the end of July. For anyone taking their vacation during the month I will try to pay the retroactive at the same time as their vacation pay.

I wish to thank you and all staff for your patience and trust you will find the above in order.

Yours very truly,

"John McKechnie"
McKechnie Ambulance Service Inc.

[emphasis added]

22. McKechnie Ambulance operates three ambulance service vehicles in Collingwood, Ontario. The three ambulances and virtually all of the equipment in the three ambulances including radio equipment are owned by Her Majesty the Queen in Right of Ontario.
23. The three ambulances operated by McKechnie Ambulance are painted with some marking as required by Schedule 1 of Regulation 14 under the Ambulance Act, R.S.O. 1980, c.20 and, in addition, have the Province of Ontario crest and the words, "Ministry of Health" on each door. McKechnie Ambulance has exercised its

discretion not to put its own markings on the ambulances, although such individual markings are common practice in the industry.

24. Attached hereto as Appendix 4 to this Statement of Facts is a manual known as the "OASIS" manual. "OASIS" stands for Ontario Ambulance Service Information System. It sets out the province-wide requirements for the documentation by ambulance driver/attendants of the movement of ambulances in Ontario. This system allows the Ministry of Health to monitor the patient movement by ambulances.
25. The Ministry of Health requires any movement of an ambulance vehicle on any kind of call to be recorded on the OASIS System which is a system of record-keeping that is detailed and requires both the ambulance attendant and the operator to assure that the records are submitted in the appropriate way as required by the OASIS manual.
26. Included in the OASIS manual and attached hereto as Appendix 5 to this Statement of Facts, is the AS5-A/B form. Responsibility for completing the form is usually shared by the ambulance attendants responding to the call, who complete the 'A' portion and the hospital staff, who complete the 'B' portion. In the event that a hospital is not contacted during an ambulance trip, the ambulance attendants complete both portions of the form.
27. The system of ambulance dispatch in Collingwood is run by the Ministry of Health through a centralized dispatch system.

28. McKechnie Ambulance is part of the Georgian Area and the central Ministry-run system operates out of Barrie, Ontario and directs the movement of ambulances both at McKechnie Ambulance and at other ambulance services in the Georgian Area.
29. The personnel employed in the central area dispatch service are Ministry of Health public servants.
30. Ambulances may only be moved if authority to do so is obtained from the dispatchers.
31. All calls for ambulances from the consuming public come through the dispatch system. In a low percentage of instances an emergency call, normally a local call, might happen to come directly into one of McKechnie Ambulance's business lines. In such a case a vehicle would be dispatched and Central Dispatch would be notified; the movement of the vehicle would then be monitored directly by Central Dispatch.
32. The dispatch service itself may bring ambulances from other services into Collingwood to assist or may take ambulances from McKechnie Ambulance to other areas to assist other services in providing services, including services operated by the Ministry of Health itself such as in Orillia.
33. Attached hereto as Appendix 6 to this Statement of Facts is a document entitled "CADS Georgian Regional Dispatch Manual". This manual is prepared by the Ministry for use by its dispatchers at its Central Area Dispatch Service known as

"CADS Georgian". This centre is the dispatch centre for all ambulance services, including McKechnie Ambulance, in the Georgian area.

34. The CADS Georgian Regional Dispatch Manual includes instructions and specific direction to ambulance personnel employed by the Ministry with respect to the various procedures set out therein. The manual is also available to the ambulance attendants of McKechnie Ambulance to serve as a guideline in carrying out their functions.
35. Two pages, pp. 308-309, in the manual, CADS Georgian, are headed "Collingwood" and refer to the McKechnie Ambulance Service which operates out of Collingwood. This provision sets scheduling, crew and vehicle requirements as follows:

COLLINGWOOD

Purpose: To establish guidelines for designation of crew/vehicle utilization.

Monday to Friday

07:00 - 15:00 1 vehicle - does local calls until 12:00 hrs
and L.D.T.'s until 09:30 hours

09:00 - 17:00 1 vehicle - does local calls after 12:00 hrs
and L.D.T.'s after 09:30 hours

15:00 - 23:00 1 vehicle

23:00 - 07:00 1 crew on call (15:00 - 23:00 hrs. crew)

Monday to Friday 07:00 - 09:00

If the staffed vehicle goes out of the area then the operator or his designate will be contacted and will make an alternate crew available. If a call is pre-booked for a 07:00 - 09:00 pickup, the operator will be contacted as soon as possible by the dispatcher booking the call to arrange alternate coverage. From 09:00 - 17:00 one staffed vehicle between Collingwood and Wasaga is sufficient for

calls of less than one hour duration. If the call will extend for more than 1 hour, the operator or his designate will be contacted and will make another crew available.

If the 15:00 - 23:00 crew departs on an L.S.T. BEFORE the 09:00 - 17:00 crew has finished their shift, the 09:00-17:00 crew will remain at base.

If the 15:00 - 23:00 crew departs on an L.D.T. AFTER the 09:00 - 17:00 crew has finished their shift, the operator will be contacted to provide coverage.

It is the operator's responsibility to notify dispatch before 17:00 hours each day and advise dispatch of the emergency contact person and/or staff available for callback.

All reasonable efforts should be made to utilize one vehicle for calls. Efforts should be made to book calls in such a sequence so that the vehicle does not return to base.

Saturday - Sunday

09:00 - 17:00	1 crew at base
all other hours	09:00 - 17:00 crew is on call until 07:00 Monday morning. The operator will be contacted to provide other staffing as necessary.

During ski season, there are two 9 - 5 crews on duty.

This provision dates to the time of the instant application in 1985 and would have been changed and updated from then to now.

36. On the 10th day of January, 1985, Mr. Malcom Bates of the Ambulance Services Branch of the Ministry of Health, forwarded to all the private ambulance operators a series of financial policies and procedures together with a standard for ambulance services management. This documentation referred to as "Quality of Ambulance Service Management/Financial Policies and Procedures" (Q.A.S.M.F.P.P.) was a consolidation of information which had been forwarded from time to time to the private ambulance operators over the past few years.

The covering letter to this consolidation of policies and procedures dated January 10, 1985 provides as follows:

Ontario Ministry of Health
January 10, 1985

MEMORANDUM

TO: All Ambulance Services
(excluding A.S.B. Services)

FROM: Malcom Bates
Manager
Land Ambulance

RE: The Quality of Ambulance Service
Management/Financial Policies and
Procedures

It is the intention of Emergency Health Services to assist all operators and their accountants/auditors in fully comprehending the methods and procedures which will result in the provision of good ambulance service management.

Enclosed herewith, therefore, you will find a manual inclusive of:

- 1) a section addressed to service operators describing the expectations of Emergency Health Services with respect to the management quality of an ambulance service;
- 2) a section of Financial Policies and Procedures which, in complementing the Ambulance Act and Regulation 14, provides a concise financial reference for ambulance service operators functioning through transfer payments.

I would urge you to carefully read both of these sections, paying particular attention to any discrepancies you may detect that exist between the procedures/policies that your service now follows and those contained in the enclosed items; any such differences should be referred to your Regional Manager or Assistant Regional Manager immediately. Further, please also bring to the attention of your Regional/Assistant Regional Manager any matters which you believe should be clarified in the Financial Manual.

Your comments to your Regional Management are welcomed.

"Malcom Bates"

In addition to the above agreed facts, Mr. John McKechnie, the owner of McKechnie Ambulance, gave evidence which may be summarized as follows:

1. On August 26, 1988, a new ambulance base was opened at 195 St Paul Street in Collingwood to replace the older one. Previously, McKechnie Ambulance had leased a garage owned by Sheppard's Sale and Services Ltd. to use as its base. The cost of that lease was included as part of the cost of running the service when he budgeted his expenses in his annual applications to the Ministry for funding.
2. The new base (both the property and buildings at 195 St. Paul St.) is owned by John McKechnie Holdings Ltd., the shares of which are held by Mr. John McKechnie and his wife. McKechnie Ambulance leases it from John McKechnie Holdings Ltd. and the cost of that lease will be included in McKechnie Ambulance's annual estimate of expenses submitted to the Ministry of Health. The cost of leasing the new premises is greater than the cost of leasing the garage.
3. The increased leasing cost has been partially approved by the Ministry of Health although they are still negotiating. McKechnie Ambulance is looking to the Ministry for the full funding for the lease.
4. The plans for the new base originated from the Ontario Ambulance Operators Association and were approved by the Ministry of Health.

5. The purchase of the property was financed by Mr. McKechnie; the Ministry of Health did not post any security.
6. McKechnie Ambulance is bound by the requirements of the Ontario Business Corporations Act.

B. JURISPRUDENCE AND TESTS FOR DETERMINING WHETHER AN ENTITY IS A CROWN AGENCY OR AN INDEPENDENT CONTRACTOR:

In Civil Service Association of Ontario and Fanshawe College of Applied Arts and Technology and Ontario Council of Regents, [1967] OLRB Rep (Dec) 829, the Ontario Labour Relations Board held that it did not have jurisdiction to entertain an application for certification in respect of employees at Fanshawe College because Fanshawe College, it concluded, was an agent of the Crown. At pp. 830-831 the O.L.R.B. defined the test it would use to determine whether Fanshawe College was an agent of the Crown as follows:

On examining the authorities in this matter, it seems clear that the test to be applied is the degree of control exercised or retained by the Crown or, put in slightly different fashion, has the body under consideration discretionary power of its own, free from control by, or consultation with, the Crown ...

However, just what amounts to a sufficient degree of control by the Crown to make the body a servant or agent, or conversely, just what amount of discretionary power must be possessed by the body to make it independent of the Crown, is not an easy matter to define. It seems to be a reasonable conclusion from the authorities, however, that the mere fact that some degree of control is retained by the Crown does not necessarily make the body an agent or servant of the Crown.

[emphasis added]

The focus of the O.L.R.B., then, was the degree of control exercised or retained by the Crown, or, conversely, the degree of discretionary power held by the entity under review.

In Fanshawe College the O.L.R.B. concluded that the statute establishing Fanshawe College gave the Board of Governors of the College very little independent discretion. To a very substantial degree all of the College's actions were subject to the direct or indirect control of either or both the Council of Regents or the Minister of Education, i.e. the Crown.

The factual basis upon which the O.L.R.B. reached its conclusion may be summarized as follows: The Crown had the authority to make regulations respecting the appointment and composition of the Board of Governors of the College, its powers and duties, diploma and admission requirements, all aspects of the program of instruction, conditions of service and qualifications of the teaching staff. Any program of education proposed by the Board of Governors required approval by the Council of Regents and ultimately the Minister, if changes were recommended. The authority of the College to enter into its own contracts was subject to the approval of the Minister of Education. The cost of the establishment, conduct and maintenance of the College was paid out of moneys from the government, provincial and federal, fees and other organizations. Respecting buildings, all plans and cost estimates required approval of the Minister although the College could pick the site. The College could appoint a director, principals, registrar, teaching and non-teaching staff but their salaries were established and approved by the Crown.

In City of Halifax and Halifax Harbour Commissioners, [1934] S.C.R. 215 the Supreme Court of Canada concluded that the Halifax Harbour Commissioners (H.H.C.), a body corporate, was an agent of the Crown and therefore not liable to the payment of business tax to the City. All of the land occupied by the H.H.C. was owned by the Crown for Crown purposes. The H.H.C. was responsible for the management and administration of the harbour. The powers of the H.H.C., the Court concluded, were subject at every turn to the control of the Crown. It could not acquire, take possession of or dispose of property without the consent of the Crown; it could only acquire capital funds by measures taken under the control of the Government; the tolls and charges which were the sources of its revenue could only be imposed under the authority of the Crown; the expenditure of revenue in the maintenance of services was under the control and supervision of the Crown; the salaries paid the officers and servants of the H.H.C. were determined under the authority of the Crown; the regulations necessary for the control of the harbour could only take effect under the authority of the Crown; surplus moneys after expenses would go into a sinking fund under the direction of the Crown and the members of the H.H.C. were appointed by the Crown and held office during pleasure. In short, the Court found that in managing and administering property belonging to the Crown, the activities, revenues and expenditures of the H.H.C. were subject to the control and supervision of the Crown. In the above-described circumstances, the Supreme Court of Canada held that the H.H.C. was an agent of the Crown.

The classic statement of the test for distinguishing an independent contractor from an agent of the Crown may be found in Montreal v Montreal Locomotive Works Ltd., [1947] 1 DLR 161 (Privy Council). The Court set out the now well-known fourfold test: 1) control, 2) ownership of the tools, 3) chance of profit, and 4) risk of loss. In

so doing, it commented that control in itself is not always conclusive and that an overall, determining question may sometimes be, whose business it is. At p.169, the Court stated the following respecting the fourfold test:

The great difference of opinion on this question [of whether Montreal Locomotive was an agent of the Crown] in the Courts below illustrates the difficulty which is inherent in deciding questions like this. In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

[emphasis added]

In Montreal Locomotive, the issue was whether Montreal Locomotive Works was assessable for municipal occupation or business taxes. If it was an independent contractor, it was; if it was an agent of the Crown, it was not. Montreal Locomotive Works had sold its property to the Crown and agreed to construct thereon, at the expense of and subject to the direction and control of the Crown, a new plant for the production of war materials. It also agreed to manage and operate the plant for a fee in respect of each item produced. The Corporation was given full day-to-day control

over the management and operation of the plant, the employment of labour and the purchase of materials. It was further agreed that the Corporation would not have to resort to its own funds for costs and expenses.

At pp. 169-170, the Court concluded that Montreal Locomotive was an agent of the Crown:

In the present case the business or undertaking is the manufacture of the warlike vehicles. The respondent might have been making them with a view to selling them to the Government for its own profit. The Government as purchaser might in that case advance funds or subsidize the work: the Crown might, as it would presumably, take powers of supervision, inspection and regulation, having specified the tests which each vehicle is to satisfy. The Government might even provide the material or the factory to the actual manufacturer. These and kindred powers might be very wide, without the result being that the manufacturer was not doing the work for his own profit and at his own risk. But in reviewing in the present case the contracts which are the determining matters, their Lordships with great respect to the Judges below who have taken a different view, find themselves in agreement with the judgment of the Supreme Court. The combined force of the whole scheme of operations seems to them to admit of no other conclusion [but that Montreal Locomotive is an agent of the Crown]. The factory, the land on which it was built, the plant and machinery were all the property of the Government which had them appropriated or constructed for the very purpose of making the military vehicles. The materials were the property of the Government and so were the vehicles themselves at all stages up to completion. The respondent supplied no funds and took no financial risk and no liability, with the significant exception of bad faith or wanton neglect; every other risk was taken by the Government. It is true that the widest powers of management and administration were entrusted to the respondent but all was completely subject to the Government's control. A "fee" was payable in respect of each completed vehicle, but when the whole plan is considered, that was solely as a reward for personal services in managing the whole undertaking. It was something very different from the risk of profit or loss which an independent contractor has to assume; every item of expense was borne by the Crown, just as the Government took every possible risk of loss or damage

except in the very unlikely event, as already noted, of bad faith or wilful neglect on the part of the respondent. The undertaking throughout was the undertaking of the Government and not the undertaking of the respondent which was simply an agent or mandatory or manager on behalf of the Crown. The accuracy of the positive announcement in each of the contracts that the respondent was acting throughout under the contracts for and on behalf of the Government and as its agent cannot be controverted.

[emphasis added]

The Tribunal is persuaded to the appropriateness of the multi-faceted approach to the issue of Crown agency as set out in Montreal Locomotive. Accordingly, the Tribunal's focus will be on the factors of control, ownership of tools, chance of profit, risk of loss and, ultimately, whose business the ambulance service is. Generally, if McKechnie Ambulance is carrying on its ambulance service on behalf of the Crown, as a manager of the Ministry of Health's Ambulance operation, it would be a Crown agent; if it is under a contract with the Crown to provide the Ministry with the services of McKechnie's own ambulance service business, it would be an independent contractor, rather than a Crown agent.

C. SUBMISSIONS:

1. Submissions of McKechnie Ambulance on the Tribunal's Jurisdiction:

Counsel for McKechnie Ambulance submits that the Union cannot apply to the Tribunal under section 40(1) of C.E.C.B.A. for a determination of the employee status of the ambulance attendants employed by McKechnie Ambulance because the Union does not hold bargaining rights granted under section 2 of C.E.C.B.A. but rather holds bargaining rights granted under the Labour Relations Act of Ontario.

Counsel further maintains that the issue of the status of McKechnie Ambulance as an agent of the Crown is res judicata. Counsel argues that by filing its application for certification with the O.L.R.B. in 1981, OPSEU was implicitly asking the O.L.R.B. whether bargaining rights would properly issue from it. Counsel observes that the only way they could, would be if McKechnie Ambulance was not a Crown agent because the O.L.R.B. would have been without the jurisdiction to issue the bargaining rights in respect of employees of a Crown agency. Counsel argues that having asked the question of the O.L.R.B. (i.e., implicitly, whether McKechnie Ambulance was a Crown agent) and received, implicitly, the answer in the negative, OPSEU cannot now ask the same question of this Tribunal, because, in his submission, the issue is res judicata.

Counsel maintains that the only way to remove the res judicata would be to either take the certification decision of the O.L.R.B. on judicial review or file an application under the Successor Rights (Crown Transfers) Act, R.S.O. 1980, c.489.

2. Submissions of McKechnie Ambulance on the Merits of the Application:

Turning to the merits of the Union's application under section 40(1) of C.E.C.B.A., counsel for McKechnie Ambulance argues that McKechnie Ambulance is not a Crown agent because it exercises substantial independent discretion. In support of this position, counsel places particular weight on the following factors:

- 1) that McKechnie Ambulance is a corporation;
- 2) that McKechnie Ambulance owns the business;
- 3) that McKechnie Ambulance may enter into contracts in its own name;
- 4) that s.4(1)(f) of the Ambulance Act contemplates independent

ownership in that it provides for the payment of operators for the provision of ambulance services;

- 5) that s.5(2)(b) of the Ambulance Act recognizes the independent value of a business such as McKechnie Ambulance because it provides that compensation be paid by a municipality to the operator for the value of the ambulance service if the Minister designates that municipality as the sole authority to operate an ambulance service in that municipality, and thus displaces the operator's service;
- 6) that under the Ambulance Act the operator has the right to object to an attempt by the Minister or Director to revoke its licence to operate an ambulance service or to place conditions on it and may, on a point of law, appeal the Minister's decision to the Divisional Court;
- 7) that under the Ambulance Act the operator may own its own vehicles and equipment, even though McKechnie Ambulance doesn't;
- 8) that as set out in para 6 of the agreed facts, between 1968 and 1973 an operator like McKechnie Ambulance could sell his service by entering into a contract to do so with the Ontario Hospital Service Commission, the predecessor to the Ministry of Health;
- 9) that McKechnie Ambulance does its own budget;
- 10) that McKechnie Ambulance is free to engage management services from any source;
- 11) that McKechnie Ambulance can suffer a loss if it exceeds the amounts paid by the Ministry;
- 12) that McKechnie Ambulance uses its own counsel, not the Ministry's counsel, in negotiating its collective agreements;
- 13) that McKechnie Ambulance hires, fires and disciplines its staff;
- 14) that Mr. John McKechnie, as a shareholder of John McKechnie Holdings Ltd., purchased and contracted for the design of the building used as a base for the ambulance service, negotiated financing with the bank for the construction of the building, and leases it to McKechnie Ambulance for the provision of ambulance services.

Looking to the specific fourfold test in Montreal Locomotive, counsel argues that with respect to ownership of tools, McKechnie Ambulance owns the service itself. He further emphasizes that it would be entitled to own the vehicles and equipment although it doesn't. Counsel stresses that there is also ownership of property in the form of the base and the land. These, however, are owned by John McKechnie Holdings Ltd., not McKechnie Ambulance.

With respect to control, counsel for McKechnie Ambulance described the memorandum from the Ministry to all operators of ambulance services dated January 10, 1985 as a guideline only, not an established policy. Moreover, he emphasizes that the covering letter indicated that comments from operators to Regional Management would be welcomed. He maintains that the only control over McKechnie Ambulance is the control set out in the Ambulance Act.

He further maintains that McKechnie Ambulance would be subject to a risk of loss if McKechnie Ambulance's actual expenses exceeded the amounts paid by the Ministry. He asserts that McKechnie Ambulance would suffer a loss if the bank called its loan on the property used as its base. This, however, would not be a loss to McKechnie Ambulance but rather to John McKechnie Holdings Ltd. since McKechnie simply leases the property from John McKechnie Holdings Ltd. and is paid for the cost of the lease by the Ministry.

Counsel further argued that McKechnie Ambulance would be subject to a chance of profit. No example of a potential profit was given, apart from a profit arising from the ownership of the property. Such a profit, however, like the loss on

the property, is something that would fall to John McKechnie Holdings Ltd. as the owner of the property and not McKechnie Ambulance, the party leasing the property.

3. Submissions Of the Ministry on the Merits of the Application:

Counsel for the Ministry acknowledges that the provision of ambulance services in general, and McKechnie Ambulance in particular, are extensively controlled by legislation. He maintains, however, that the whole of the health services industry is subject to strict legislative controls and argues that the whole health field cannot be said to be a Crown agency.

Counsel for the Ministry points to the Ministry of Health Act, R.S.O. 1980, c.280. He notes that section 6(1) provides, in part, as follows:

6(1) It is the function of the Minister and he has power to carry out the following duties:

...

- (c) to be responsible for the development, co-ordination and maintenance of comprehensive health services and a balanced and integrated system of hospitals, extended care facilities, nursing homes, laboratories, ambulances and other health facilities in Ontario;
- (d) to enter into agreements for the provision of health services and equipment required therefor and for the payment of remuneration for such health services on a basis other than fee for service.

...

- (i) to authorize and provide financial support ... for the establishment and operation of corporations to supply ... and health care facilities and to others associated with health workers and the

health field generally and enter into agreements necessary therefor ... on such terms and conditions and for such periods as the Minister considers advisable to assist in financing all or any part of the cost of such centralized services ...

[emphasis added]

Counsel argues that ambulance services are a "health service" within the meaning of the Ministry of Health Act and that in the case of McKechnie Ambulance the Minister has acted pursuant to section 6(1)(d) and (i) of the Ministry of Health Act and contracted with McKechnie Ambulance for the provision of a health service i.e. ambulance services. Counsel asserts that the Ministry has also contracted in a similar way with hospitals to provide health services under this legislation and that that fact alone cannot make them Crown agencies.

Counsel for the Ministry points to the Health Insurance Act, R.S.O. 1980, c.197 and notes that under that Act, "health facility" is defined in section 1(f) as including "ambulance services". Counsel emphasizes that the government is paying for the insured services provided by every practitioner in Ontario and, moreover, that the Health Insurance Act in section 43 allows the Minister to appoint inspectors with the power to inspect, examine and audit books, accounts, reports and medical records maintained in hospitals, health facilities and offices of physicians respecting patients who are in receipt of insured services. Counsel argues that the financing of services, according to prescribed amounts set in the Regulations, the ability to inspect and the further regulatory powers of the Minister as set out in this Act do not render these health facilities Crown agencies and should not do so for McKechnie Ambulance either.

that these factors in respect of McKechnie Ambulance should not render it a Crown agent.

Counsel argues that McKechnie Ambulance has the right to sue and be sued, to contract, to borrow money, to hire and fire, and to negotiate with a union. He observes that if its business is taken over by a municipality pursuant to section 5(2) of the Ambulance Act it has the right to be compensated. In addition, counsel maintains that there is nothing in the Ambulance Act to preclude McKechnie Ambulance from purchasing land and constructing an ambulance base for the provision of ambulance services.

Counsel argues, in sum, that McKechnie Ambulance is an independent contractor which has entered into a contract with the Ministry to provide ambulance services and has not, by reason of that contract, become a Crown agent, notwithstanding that ambulance services are subject to substantial legislative controls.

4. Submissions Of the Union on the Tribunal's Jurisdiction:

As set out, McKechnie Ambulance raises the certification of OPSEU by the O.L.R.B. in 1981 to argue that the issue of Crown agency is res judicata and cannot now be litigated before this Tribunal.

Counsel for the Union argues that the 1981 certification proceeded on the basis of agreement on all issues and that the question of the status of McKechnie Ambulance as a Crown agent was not raised by any party. Counsel argues that since the status of McKechnie Ambulance was not adjudicated by the O.L.R.B. in the course of its certification proceeding the issue is not res judicata.

Counsel for the Union further submits that the res judicata issue was already disposed of by the Divisional Court. McKechnie Ambulance placed the argument of res judicata before the Divisional Court in the stated case involved in this proceeding: Re The Ontario Public Service Labour Relations Tribunal and OPSEU and McKechnie Ambulance Service Inc. and the Crown in Right of Ontario and Ontario Union of Court Reporters, decision of the Divisional Court of Ontario dated November 17, 1987. At pp.10-11 of his judgment, Callaghan, A.C.J.H.C. stated the following respecting the res judicata submission of McKechnie Ambulance:

Counsel for McKechnie Ambulance Service Inc., the other respondent, submitted that the issue of employee status was res judicata as a result of the Ontario Labour Relations Board certificate of March 26, 1981 authorizing O.P.S.E.U. to act as bargaining agent for the McKechnie employees. Counsel suggested that since the Labour Relations Act, R.S.O. 1980, c.228 does not apply to the Crown by virtue of s.11 of the Interpretation Act, R.S.O. 1980, c.219, the Labour Relations Board in granting a certificate to O.P.S.E.U. necessarily found that the members of the bargaining unit were not Crown employees. It is not clear, however, that such a decision constitutes res judicata in any event because the certificate resulted from an agreement between the parties and not from an adjudication of issues such as employee status. Nor is it clear that the principle of res judicata applies between statutory boards. On the other hand the Labour Relations Board certificate may be a circumstance to be considered by the Tribunal at the hearing of the application involving the employees of the McKechnie Ambulance Service Inc. In any case, s.6(2) of the Successor Rights (Crown Transfers) Act, R.S.O. 1980, c.489 provides that in circumstances constituting a "transfer" to the Crown, the Crown Employees Collective Bargaining Act applies to the bargaining agent certified to act on behalf of the employees affected by the transfer. In other words, if McKechnie Ambulance Service is or has become a Crown agency, the Act applies. Accordingly, the existing certificate cannot be a bar to the application under s.40

Counsel for the Union argues that the conclusion of the Divisional Court on the issue of res judicata constitutes a far clearer res judicata than the O.L.R.B. certification in 1981.

5. Submissions of the Union on the Merits of the Application:

Counsel for the Union emphasizes the statement at p.10 of the Divisional Court decision, supra, that an entity may be considered a Crown agency in respect of some of its undertakings but not all:

Moreover, a conclusion that a party is a Crown agency in respect of certain activities does not mean that it is a Crown agency for all purposes. Thus, it is clear that the determination of whether a party is "acting on behalf of the Crown" in any given circumstance requires that the Tribunal deal with issues that are, for the most part, essentially factual.

The Union's assertion that McKechnie Ambulance is a Crown agent is limited to its activity of providing an ambulance service and does not extend to any other activity it may pursue.

Counsel for the Union submits that it would be inappropriate to be swayed by what he characterizes as the exaggerated and unrealistic suggestion of the Ministry that the whole health industry would have to be a Crown agent if McKechnie Ambulance is found to be one. He stresses that the factual underpinning to each of these other health facilities and services is unique, that they would stand on their individual merits and that they are not before the Tribunal.

Counsel emphasizes that over the last decade there has been an increase in government intervention in areas previously preserved to the private sector. Counsel

comments that more and more the government has become the paymaster and in carrying out its responsibility for funds has exerted increasing control over the manner in which services are provided. He maintains that in some cases, like with McKechnie Ambulance, the government has ceased to function as a facilitator of the service and has become the controller of the service.

Looking at the fourfold test, counsel for the Union argues that the control over McKechnie Ambulance exerted by the Crown by virtue of the provisions of the Ambulance Act and its Regulations is overwhelming and covers every significant aspect of the ambulance service. Counsel describes McKechnie Ambulance as the Ministry's local manager of the ambulance service in the Collingwood area. He notes that when McKechnie Ambulance has any difficulty, the manuals issued by the Ministry direct it to a position called "your Regional Manager" which is part of the Ministry of Health and which counsel for the Union describes as the Ministry's next level of management above McKechnie Ambulance.

Counsel argues that there is no chance of profit or risk of loss because overpayments of funds by the Ministry to the operator for expenditures must be returned and underpayments are advanced to the operator. Counsel argues that if McKechnie Ambulance spends its funds on legitimate ambulance services and it turns out that it is underfunded, then the Ministry reimburses it pursuant to section 4(1)(f). Equally, he maintains, if McKechnie Ambulance spends less than its projected expenses then the extra funding is moved to other budgeted areas, by approval, or returned to the Ministry.

It may be noted that counsel for the Ministry and McKechnie Ambulance did not dispute the Union's characterization of s.4(1)(f), i.e., that if there is an underpayment for a legitimate expense in operating the ambulance service, McKechnie Ambulance would be reimbursed by the Ministry and, in like manner, if there is an overpayment, McKechnie Ambulance would return the funds to the Ministry or, with approval, transfer it to a different area of the budget. Counsel points the following paragraph in the document issued to all ambulance services from the Ministry of Health entitled "Quality and Standards of Ambulance Service Management Functions" respecting staffing patterns which shows that an operator cannot increase profits to itself by reducing staff:

II STAFFING PATTERN

The staffing pattern approved by the Regional Manager and submitted with the budget is to be followed. Approved staffing patterns cannot be changed without the prior written approval of the Ministry. Funds saved by reducing the staff or changing the make up of the approved pattern (e.g. from full-time to part-time or standby, or from driver/attendant to dispatcher or supervisor, etc.), cannot be used for any other purpose without the prior written approval of the Ministry. Any savings realized as a result of such changes must be returned to the Ministry.

Counsel for the Union further notes that under section 46 of the Regulations an operator cannot refuse to provide ambulance services as a cost saving measure. The service must be provided. In summation, counsel for the Union asserts that the provision of an ambulance service in Collingwood is essentially the business of the Ministry and that McKechnie Ambulance, like the Halifax Harbour Commissioners and Montreal Locomotive Works Ltd., is essentially managing the business or service on behalf of the Crown.

Respecting McKechnie Ambulance's alleged ability to own its vehicles, counsel for the Union argues that the Regulations stipulate that if the Ministry doesn't provide the vehicles the only permissible means of obtaining the ambulances is through the approval of the Ministry. Accordingly, he argues, this is not the kind of "ownership of tools" that would reflect the status of an independent contractor, even if McKechnie Ambulance were to own its own vehicles.

D. DECISION ON THE TRIBUNAL'S JURISDICTION:

Consistent with the findings of the Divisional Court, this Tribunal concludes that the certification of OPSEU as the bargaining agent of the employees of McKechnie Ambulance by the O.L.R.B. in 1981 does not raise a bar to the adjudication of the status of McKechnie Ambulance by this Tribunal. The Divisional Court expressly addressed this Tribunal's jurisdiction to entertain the Union's instant application under section 40 and determined it was fully within the Tribunal's jurisdiction. Preliminary objections raised again by McKechnie Ambulance when the Tribunal convened to entertain the merits of the Union's application are hereby dismissed.

E. DECISION ON THE STATUS OF MCKECHNIE AMBULANCE, I.E. WHETHER IT IS A CROWN AGENT:

The Tribunal will assess the relationship between the Ministry of Health and McKechnie Ambulance in respect of the provision of the ambulance service in Collingwood from the perspective of the fourfold test established in Montreal Locomotive: 1) control 2) ownership of tools 3) chance of profit 4) risk of loss and,

ultimately, from the perspective of 5) whose business it is, the business of McKechnie Ambulance or the business of the Crown as managed by McKechnie Ambulance.

1. CONTROL:

The Legislature of Ontario, primarily through the Ambulance Act, R.S.O. 1980, c.20 and its Regulations, has established a system of ambulance service for Ontario. The Minister of Health is responsible for the administration and enforcement of the Ambulance Act (s.2) and has been given the power and the duty do the following, as set out in section 4 of the Ambulance Act:

- (a) to ensure the development throughout Ontario of a balanced and integrated system of ambulance services and of effectual ambulance communications facilities;
- (b) to require hospitals to establish, maintain and operate ambulance services and intercommunication respecting ambulance services;
- (c) to establish, maintain and operate, alone or in co-operation with others, ambulance services, intercommunication systems in connection with ambulance services and storage depots for the equipment and supply of ambulances;
- (d) to establish and operate, alone or in co-operation with one or more organization, institutes and centres for the training of personnel for ambulance services;
- (e) to receive and disburse all moneys appropriated by the Legislature for the purposes of this Act and all moneys payable to the Ministry under this Act;
- (f) to determine the amounts to be paid by the Minister and to pay operators for ambulance services provided and to make retroactive adjustments for underpayment and overpayment for such services according to the cost thereof;

- (g) to establish regions and districts for the purposes of ambulance services and the communications facilities therefor.

[emphasis added]

The Minister is further empowered to make Regulations covering the following areas, as set out in section 22 of the Ambulance Act:

- (a) prescribing the standards of conveyances and equipment for ambulance services and of their maintenance and repair and requiring the approval of the Director of the acquisition of such conveyances and equipment as are specified in the regulations;
- (b) governing the management, operation and use of ambulance services, including insurance against liability in connection with their operation;
- (c) prescribing the records, books, audits and accounting system to be kept, made or followed by operators and the returns, reports and information to be submitted to the Director or the Minister;
- (d) prescribing the qualifications for persons employed in ambulance services including their testing and examination, physical or otherwise;
- (e) providing for the issuing of licences and prescribing terms and conditions of licences;
- (f) requiring the payment of fees in connection with licences and applications therefor and prescribing the amounts thereof;
- (g) prescribing the fees that may be charged by the operators of each class of ambulance service for each kind of service provided, the methods and times of payment of such fees to the operators and the proportion thereof that may be charged to the person transported in an ambulance.

[emphasis added]

Pursuant to these powers and duties, the Ambulance Act and Regulations establish a scheme for the provision of ambulance services in Ontario whereby substantial and wide-ranging control is exercised by the Ministry of Health over the operators of ambulance services, such as McKechnie Ambulance. Various documents and manuals have been issued by the Ministry to assist operators in carrying out their services in compliance with the very detailed requirements set by the Ministry in order to "ensure ... throughout Ontario a balanced and integrated system of ambulance services ..." (s.4(a) of the Ambulance Act). For example, the Ministry of Health has issued to all operators in Ontario, including McKechnie Ambulance, a detailed, 23-page memorandum covering the areas of operational management, community/public relations as well as financial policies and procedures for ambulance operators. This document is referred to as "Quality of Ambulance Service Management/Financial Policies and Procedures" (Q.A.S.M.F.P.P.). Another such document or manual consisting of approximately 130 pages issued by the Ministry to ambulance operators is entitled "OASIS Manual for the AS5-A/B". It sets out the province-wide requirements for the documentation by ambulance driver attendants of the movement of ambulances in Ontario. The AS5-A is an ambulance call record, the AS5-B is the billing record, and the AS5-D is the dispatch record. These records, properly processed, are considered by the Ministry to be key documents in the provision of Ontario's ambulance service.

As well, the CADS Georgian Regional Dispatch Manual governing the Georgian area, which includes Collingwood where McKechnie Ambulance operates, has been issued by the Ministry for use by the dispatchers. It sets out very detailed directions for the provision of ambulance services including, among many others, such subjects as accident reports, area coverage, call ins, extension of crews' shifts, helicopter landing sites, air escorts, double patient transfers, patients in custody, pagers, I.V. policies, radio

procedures, staff schedules, vehicles for repair etc. It is available to the McKechnie Ambulance attendants to guide them in carrying out their functions.

The degree of control over the operator of an ambulance service like McKechnie Ambulance imposed by the Ambulance Act (referred to below as "AA") and its Regulations, particularly Regulation 14, RRO 1980, as amended to O. Reg. 496/85, is extensive. While not intended to be all inclusive, the nature of the control may be summarized as follows:

a. Re ESTABLISHMENT AND CONTINUATION OF AN AMBULANCE SERVICE:

1. The Minister must approve any application to incorporate where the objects of the Corporation include the operation of an ambulance service (s.7 of AA).
2. Operation of an ambulance service requires the authority of a licence issued by the Director of the Ambulance Services Branch of the Ministry (s. 8 of AA).
3. The licence to operate an ambulance service is subject to the terms and conditions set by the Director (and ultimately the Minister) or the Regulations to the AA (s.8 of AA and s.16 of AA).
4. The Director and, ultimately, the Minister may refuse to issue a licence (s.11 of AA and s.16 of AA).
5. When a Corporation holds the licence, as does McKechnie Ambulance, it must notify the Director within 15 days of a change in the officers or directors of the Corporation (s.19 of AA).
6. A licence to operate an ambulance service expires after one year (s.20 of AA).
7. The license to operate an ambulance service is not transferable (s.3(4) of Reg. 14 to AA).

b. Re EQUIPMENT TO BE USED IN PROVISION OF AMBULANCE SERVICES:

1. The operator must ensure that every ambulance used in his ambulance service is constructed and equipped and marked in accordance with the specifications prescribed by Schedule 1 to Regulation 14 of the AA; is provided with ambulance accessory equipment in accordance with Schedule 2, contains medical equipment in accordance with Schedule 3 and contains no other equipment (s.19 of Reg. 14 to AA).
2. The required equipment accessories and supplies include such items as spare tires, flares, portable hand lights, one stair chair, various stretchers of specific design, fracture boards, blankets, hyperallergenic pillows, specified oxygen equipment, specified ventilator, specified suction apparatus, specified bandages and dressings and many others, all of which are detailed by required numbers and specifications (Schedules 1, 2 and 3 of Reg. 14 to the AA).
3. An operator is prohibited from acquiring any ambulance or ambulance equipment not specified by the Regulations without the prior approval of the Director of the Ambulance Services Branch of the Ministry (s.20 of Reg. 14 to AA).
4. The operator is required to maintain his ambulance and equipment in safe, clean and proper working order (s.22 of Reg. 14 to AA).
5. The operator is required to have each ambulance inspected at an approved inspection station once every six months and file a safety standards certificate with the Director within 30 days of the inspection (s.23 of Reg. 14 to AA).
6. The operator is required to ensure that any ambulance that does not meet inspection standards is not used and to immediately notify the dispatch centre (s.23 of Reg. 14 to AA).
7. The operator is prohibited from using or permitting to be used an ambulance for any purpose not directly related to the provision of ambulance service (s.48 of Reg. 14 to AA).
8. The operator must ensure that every ambulance displays at the lower left corner of the windshield the ambulance number designated by the Director and the operator is required to use only that number as the radio call number (s.62 of Reg. 14 to AA).

c. Re THE EMPLOYEES WHO OPERATE THE AMBULANCE SERVICE:

1. Qualifications:

- a) Qualifications for persons employed in an ambulance service as driver attendants are set by Regulation to the AA and include such qualifications as age, education, ability to read, write and speak

English, the holding of a licence required to drive an ambulance, freedom from communicable diseases, immunization against named diseases, designated periods of freedom from suspension of drivers licence and prohibition from driving under Criminal Code, freedom from conviction for crime involving moral turpitude, the holding of certificates for named health services like cardio-pulmonary resuscitation, casualty care, first aid (s.7 of Reg. 14 to AA).

- b) Operators are prohibited from hiring or keeping in their employ driver attendants who do not meet the specified qualifications (s.7 of Reg.14 to AA).
- c) Operators are required to take steps to ensure that the driver attendants are in good mental and physical health and are of good character and habit (s.15 of Reg. 14 to AA).
- d) The Director of the Ambulance Service Branch of the Ministry may require any emergency medical care assistant to take an examination set by the Director to test knowledge and proficiency (s.16 and 17 of Reg. 14 of AA.)

2. Duties of the Employees:

- a) Each member of an ambulance crew who attended on a call that used equipment that requires sterilization must ensure such equipment is sterilized as soon as is practicable after possible contamination (s.24 of Reg. 14 to AA).
- b) Each crew member must make a report of each call (s.43 of Reg. 14 to AA).
- c) Each crew member must ensure that patients are secured by seat belts or other designated means (s.47 of Reg. 14 to AA).
- d) The driver must search the ambulance for property lost or left immediately upon the termination of an ambulance trip and deliver any property found to specified locations (s.54 of Reg. 14 to AA).
- e) No full-time employee may be required or permitted while on duty in the ambulance service to perform any duties that are not directly related to the provision of ambulance services as detailed in the Regulations (s.60 of Reg. 14 to AA).

3. Dress of the Employees:

- a) The operator must ensure each driver attendant is neat and clean when responding to a call (s.55 of Reg.14 to AA).

- b) Every emergency medical care assistant must display on his clothing an insignia bearing the words "Emergency Medical Care Assistant" (s.55 of Reg.14 to AA).

4. Records of Employees:

- a) The operator is required to keep a register of employees, record specified information and provide such information to the Director or Minister upon demand (s.31 of Reg. 14 to AA).
- b) The operator is required to notify the Director within 30 days of any employee dismissed for incompetence or ill health (s.31 of Reg. 14 of AA).
- c) The operator is required to keep employee records for 5 years after the employee leaves the employ of the operator (s.31 of Reg. 14 to AA).
- d) The operator is required to maintain a current record of the daily hours of work performed by each employee in his ambulance service (s.39 of Reg. 14 to AA).

5. Staffing Patterns:

- a) Staffing patterns are approved by the Director or Regional Manager of the Ambulance Services Branch (see s.64 of Reg.14 to AA and "Quality and Standards of Ambulance Service Management Functions" (Q.S.A.S.M.F.), issued by Ministry, p.14, (Part I of Q.A.S.M.F.P.P.)).
- b) Staffing patterns that are approved and submitted with the budget are required to be followed and cannot be changed without prior written approval of the Ministry (see s.58 Reg.14 to AA and Q.S.A.S.M.F. p.14).
- c) Any funds saved by changing staffing patterns must be returned to the Ministry (s.4(1)(f) and Q.S.A.S.M.F. p.14).
- d) There must be two qualified driver attendants on duty in respect of each ambulance immediately available for service (s.57 of Reg.14 to AA).

6. Negotiations With the Union Where One is Involved:

- a) In its manual provided operators, Q.S.A.S.M.F., the Ministry sets out guidelines and requirements for operators in their negotiation of collective agreements.

- b) The manual at p.5 stipulates the types of agents that may be used in the negotiations, (i.e. lawyers or accountants), the types of conditions that must be agreed to (i.e. realistic and non-excessive), the level of adherence to the collective agreement expected of the operators (total) and the acceptable number of grievances (minimal). It is apparent that these guidelines are expected to be followed if the operator wants to receive funding for the expenses contained within the terms of the agreement.

d. Re PROHIBITION AGAINST SOLICITATION OF BUSINESS BY OPERATOR:

1. Where the Ministry establishes a Dispatch Centre which it has for the area covering Collingwood and McKechnie Ambulance, the operator must itself cease operating a dispatch centre (s.4(d) of Reg. 14 to AA).
2. The operator must not use or permit to be used any telephone line under his control for the purposes of receiving calls for ambulance service and must not hold out any telephone number as the number to call for ambulance service except the number of the Ministry's Dispatch Centre (s.4(d) of Reg. 14 of AA).

e. Re ACTUAL PROVISION AND OPERATION OF THE AMBULANCE SERVICE:

1. Each member of the crew who responds to a call for ambulance service and each operator shall make a report of the call and dispose of it in accordance with directions specified in Schedule 4 of Regulation 14 (s.43 of Reg. 14 to AA).
2. The operator is prohibited from using etc. certain radio communication equipment and frequencies (s.25,26,27,28,29,30 of Reg. 14 to AA).
3. An operator cannot refuse or permit his employees to refuse to provide ambulance service (s.46 of Reg. 14 to AA).
4. The operator must take all reasonable steps to ensure that there are on duty in respect of each ambulance immediately available for ambulance service at least two qualified driver attendants (s.58 of Reg. 14 to AA).
5. No operator or crew member may transport or permit to be transported the remains of a dead person except as specified (s.49 of Reg. 14 to AA).
6. No person may smoke in an ambulance (s.51 of Reg. 14 to AA).
7. No operator or crew member may transport a patient across Ontario's border (s.52 of Reg. 14 to AA).
8. The operator must ensure that every movement of an ambulance is reported to the Dispatch Centre (s.63 of Reg. 14 to AA).

9. The CADS GEORGIAN, REGIONAL DISPATCH MANUAL sets out detailed guidelines for McKechnie Ambulance for the designation of crew/vehicle utilization and many other aspects of the service noted above.
10. The OASIS Manual for the AS5-A/B issued by the Ministry establishes a central uniform system of record-keeping including ambulance calls, records, billing records and dispatch records. The manual consisting of 130 pages advises the operators and driver attendants exactly how the forms, supplied by the Ministry, should be filled out in the daily operation of the ambulance service. Each employee is assigned a 3 digit identity number to be recorded on the various forms.

f. Re ACCOUNTING SYSTEM AND REPORTS:

1. The operator is required to maintain current financial records in accordance with generally accepted accounting principles.
2. The operator is required to record the receipts, expenditures, assets, liabilities and equity of the ambulance service, is required to have quarterly and annual financial statements prepared, is required to have his financial records audited yearly, is required to keep his ambulance service financial records separate from any other business enterprise, and is required to submit his financial statements to the Ministry (s. 33 of Reg. 14 to AA).

g. Re BUDGETS:

1. Every year McKechnie Ambulance submits a detailed Budget request to the Ministry for funding of the ambulance service provided by McKechnie Ambulance. The operator must complete detailed forms supplied by the Ministry. The Ministry issues to operators "Explanatory Notes" of some 47 pages to assist in the completion of these documents. The document sets out for operators precisely what expenses will be covered, precisely what expenses require prior approval, precisely what records must be kept and how etc. Budget allocations must not be exceeded without written approval from the Ministry.
2. The funds issued by the Ministry for budget items cover virtually all the expenses of the service and are very carefully monitored and regulated by the Ministry (See The Financial Policies and Procedures For Ambulance Operators issued by the Ministry, Part II of Q.A.S.M.F.P.P.)
3. The Ministry, for example, requires the operators to claim fuel tax rebates every year if fuel costs are to be covered by Ministry funds. The operator is advised that the rebate forms are available "from [his] Regional Manager". Moreover, if funds are saved by reducing staff from staffing patterns that have been approved by the Regional Manager of the Ambulance Services Branch and submitted with the budget, they cannot be

used for any other purpose and must be returned to the Ministry (Q.S.A.S.M.F.).

h. Re PAYMENT FOR PROVISION OF AMBULANCE OF SERVICES:

1. The Minister has the power and duty to determine the amounts to be paid to operators for ambulance services (s.4(1)(f)AA).
2. The Minister has the power and duty to make retroactive adjustments for underpayment and overpayment for ambulance services according to the cost thereof (s.4(1)(f)AA).
3. The operator is prohibited from using the funds or equipment and supplies received from the Province for the ambulance service for any purpose other than that directly related to the provision of ambulance services (s.36 of Reg.14 to AA).
4. Where the Province provides funds to the operator and directs that they be used for a specific purpose the operator may only use those funds for the purpose so specified (s.36 of Reg. 14 to AA).
5. The Ministry has determined that McKechnie Ambulance like all other similar operators will be compensated on the basis of the number of ambulance calls its service made in the previous year. This is the only form of compensation for the provision of the service and is called the "Management Compensation Plan".

i. Re MINISTRY SUPERVISION OF THE AMBULANCE SERVICE BEING PROVIDED:

1. Inspectors appointed by the Ministry may enter the business premises or the ambulance vehicles of an operator at any time and inspect, extract, examine, make copies of matters for the purpose of determining an operator's compliance with the regulations (s.18 of AA).
2. The operator is required to make and send to the Director an incident report respecting any formal complaint received by him respecting his ambulance service as well as every investigation carried out by him respecting his ambulance service and every unusual occurrence (s.32 of Reg. 14 to AA).
3. Upon written request by the Director, the operator is required to make returns and reports and give information requested by the Director respecting the operation of his ambulance service.
4. Where contentious or major issues arise respecting the ambulance service the Ministry requires the operator to refer them to the Ambulance Services Branch for consultation and/or assistance prior to releasing statements to the media (Q.S.A.S.M.F. p.11).

j. Re PENALTIES AGAINST OPERATOR FOR NON-COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE AMBULANCE ACT FOR THE PROVISION OF AMBULANCE SERVICE:

1. Any person who contravenes the Act or Regulations is guilty of an offence and liable to a fine on conviction.

k. Re TERMINATION OF THE SERVICE:

1. The Director of the Ambulance Services Branch of the Ministry may revoke, suspend or refuse to renew a licence to operate an ambulance service (s.12 of AA).
2. The Minister may make an order closing an ambulance service (s.5 of AA).
3. If an operator terminates his operation of an ambulance service he must, prior to the termination, deliver to the Director specified records, reports, documents, registers, invoices, property owned by the Province and pay any overpayments made by the province (s.68 of Reg. 14 to AA).

To summarize the control that the Ministry exercises over McKechnie Ambulance it directs under pain of penalty or loss of licence to operate,

1. the terms and conditions under which the service will be operated;
2. when it may or may not refuse to provide ambulance service;
3. what vehicles it will use to operate its service;
4. what accessory equipment and medical supplies and in what precise amounts will be contained inside the vehicles;
5. what equipment may not be obtained;
6. how the vehicles will be maintained and when they will be inspected;
7. the notification required when vehicles do not meet required standards;
8. for what purposes the ambulance vehicles may and may not be utilized;
9. what insignia is required on the vehicles;

10. the numerous and detailed qualifications required for the driver attendants and the state of their character and health;
11. the minimum number of qualified personnel who must be employed;
12. the periodic examinations that may be required;
13. many of the duties required of the driver attendants respecting such things as searching vehicles after calls, securing patients to the vehicle, sterilizing equipment, filling out reports of calls etc.;
14. duties that may not be required of employees;
15. the dress of employees;
16. the records that must be kept for employees and for how long;
17. the notification required when employees leave employment;
18. the staffing patterns that must be maintained once approved;
19. the sole source of its business and a prohibition against any direct solicitation;
20. the radio equipment and frequencies that may and may not be used;
21. the level of service that must be provided;
22. the type of patient (dead vs. alive) that may and may not be transported;
23. where patients may and may not be transported (inside vs. outside Ontario);
24. what may be consumed in the vehicles (prohibition against smoking);
25. the reports that must be submitted whenever an ambulance is moved;
26. when and under what circumstances an ambulance may and may not be moved;
27. the financial records that must be kept and the information that must be recorded;
28. the financial statements that must be prepared and their frequency;
29. the audits that must be carried out and how often;
30. the entities to which financial information must be reported;
31. the strict terms under which funds are advanced by the Ministry for the operation of the service and a prohibition against use of the funds for any purpose other than the purpose for which they are advanced;

32. the basis upon which and the amount the operator is paid for the operation of the ambulance service;
33. the inspections that may be carried out of the operator's business premises and vehicles to ensure compliance with the Ambulance Act and its Regulations;
34. the reports that must be sent to the Ministry respecting incidents, investigations or unusual occurrences;
35. the consultation that must take place where contentious or major issues arise;
36. the steps that must be taken by an operator to terminate his service.

On the basis of the foregoing, the Tribunal concludes that there is virtually no significant or substantial aspect of the operation of the ambulance service in Collingwood that is within the control and discretion of McKechnie Ambulance.

B. OWNERSHIP OF TOOLS:

The three vehicles operated by McKechnie Ambulance are owned by the Ministry of Health. Virtually all of the equipment in the vehicles, including the radio equipment, is owned by the Ministry of Health. Some of the more disposable items like tongue depressors, bandages and tape are purchased by McKechnie Ambulance with funds provided by the Ministry. Moreover the building which McKechnie Ambulance uses as a base for its operation is not owned by it. Rather, it is leased with the lease cost paid by the Ministry.

The evidence reveals that none of the major items used to provide the ambulance service are owned by McKechnie Ambulance.

C. CHANCE OF PROFIT:

The ability of McKechnie Ambulance to generate business and maximize profits does not exist. The Ministry has established a Dispatch Centre for the Georgian Region which covers the Collingwood area serviced by McKechnie Ambulance. Once such a centre is established, the Ambulance Act prohibits McKechnie Ambulance from soliciting its own business. Section 4 of Regulation 14 to the Ambulance Act prohibits McKechnie Ambulance or any other such operator from using telephone lines under its control for receiving calls for ambulance service. Moreover, it cannot hold out any number other than the Ministry's Dispatch Centre as a number to call for ambulance service. The Ministry's Dispatch Centre, therefore, is the only source of work for McKechnie Ambulance.

The operator is prohibited from using funds received from the province for any purpose other than one directly related to the provision of ambulance services. McKechnie Ambulance is unable to maximize its profits by trying to save money in budgeted items and retaining the overpayments. Funds issued by the Ministry for specified budgeted items cannot be used for any other matters without prior approval of the Ministry and overpayments are either applied to other budget items with approval or returned to the Ministry.

The profit that is made by McKechnie Ambulance is solely derived from money paid by the Ministry under what is called its "Management Compensation Plan". The compensation is in the form of fees based on the number of ambulance calls in the previous year. McKechnie Ambulance, however, does not have control over the number of calls it receives because that is determined by the Ministry's Dispatch Centre. Thus, while McKechnie Ambulance receives payment for providing its service, its opportunity

to enhance its own profits through the normal entrepreneurial channels of increased efficiency, promotion or advertising or "service with a smile" are not available to it. McKechnie Ambulance has no source of money apart from the Ministry and it has no opportunity to maximize that profit through the exercise of independent discretion or business acumen.

D. RISK OF LOSS:

In its negotiations with the Union one of the terms of the collective agreement is that the terms reached would be approved by the Ministry i.e. that the Ministry would provide the funding for the level of commitments agreed to with the Union. As long as the terms of the collective agreement are not excessive, as stipulated in the Ministry's manual for operators, the evidence indicates that the Ministry funds the operator's basic financial commitments to its employees.

Virtually all of the expenses McKechnie Ambulance incurs in the provision of the ambulance service are covered by the Ministry. If the legitimate expenses of the operator exceed the budget then the evidence reveals that the Ministry reimburses the operator for the shortfall. Controls are placed on the Ministry's funding of these expenses and some require prior approval and/or specific claims like fuel tax rebate claims. The guidelines and requirements are clearly set out in the various documents issued by Ministry and referred to above. There may be a risk of loss if an operator does not act in accordance with the guidelines. As long as McKechnie Ambulance abides by the Ministry's guidelines and directives in the operation of the service, however, there is little or no risk of loss in the operation of the ambulance service.

E. WHOSE BUSINESS IT IS:

Standing back from the details but drawing on all of the factors set out above, the Tribunal concludes that the ambulance service provided by McKechnie Ambulance is the Ministry's business. Virtually every significant and tiny aspect of the business is tightly controlled by the Ministry. There is nothing of substance left for McKechnie Ambulance to decide. There is virtually no room for independent discretion. The Ministry has not simply contracted with McKechnie Ambulance to provide an ambulance service in Collingwood and left it to McKechnie Ambulance to determine how that would best be done. The Ministry has contracted with McKechnie Ambulance to have it carry out the Ministry's ambulance service business, every detail of which has been set and determined by the Ministry in accordance with the Ambulance Act and its Regulations. It is telling to recall that the fees paid to McKechnie Ambulance for compensation are paid under what is called "The Management Compensation Plan". The initial position from the Ministry to which McKechnie Ambulance is directed to refer problems or obtain advice is referred to as "your Regional Manager". While such names and titles do not decide the issue, they do in this case accurately reflect the role that McKechnie Ambulance plays; it is the manager of the Ministry's service in Collingwood. We note further that the ambulances operated by McKechnie Ambulance have on their doors the emblems of the Ministry of Health. They do not bear the name of McKechnie Ambulance.

McKechnie Ambulance is an integral part of the Province's ambulance service. The Tribunal accepts the characterization offered by the Union that McKechnie Ambulance functions as a local manager carrying out the business of the Crown in strict compliance with the dictates of the Crown as to how the business should be operated. Any significant departure from the directives and procedures established by the Minister

would result in the Ministry revoking the licence of McKechnie Ambulance. If that happened, McKechnie Ambulance could not simply move to another town or to try to find another customer for its ambulance services. It would be prohibited by legislation from providing ambulance services to anyone.

The Ministry's directives even go so far as to require that "[c]ontentious or major issues be referred to the Ambulance Services Branch for consultation and/or assistance, prior to release of statements to the media" (Q.S.A.S.M.F. p11). This requirement hardly reflects the freedom that would be expected from an entity carrying on its own business. Moreover, McKechnie Ambulance is foreclosed from selling a going business. It is prohibited from transferring its licence to operate a service by s.3(4) of Reg. 14 to the Ambulance Act and no service can be carried on without such a licence (s.8 of the Ambulance Act). The inability to sell one's service as an active operation is not what would be expected of an entity operating a business on its own behalf. Instead it is reflective of an agent carrying on the business of the Crown.

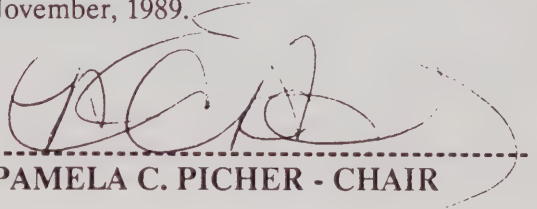
The details of the relationship between McKechnie Ambulance and the Ministry of Health as assessed from the perspective of control, ownership of tools, chance of profit and risk of loss lead inevitably to the conclusion that the business of providing an ambulance service in the Collingwood area is the business of the Ministry of Health and that the role of McKechnie Ambulance is to manage that business for the Ministry.

Accordingly, the Tribunal concludes that McKechnie Ambulance is a Crown agent.

F. DECISION ON THE UNION'S APPLICATION UNDER S.40 OF C.E.C.B.A.

It is common ground that if McKechnie Ambulance is a Crown agent then the employees of McKechnie Ambulance are Crown employees within the meaning of section 1(e) of the Public Service Act and thus are employees within the meaning of section 1(1)(f) of C.E.C.B.A., and we so find.

DATED at Toronto this 30th day of November, 1989.



PAMELA C. PICHER - CHAIR

I CONCUR

"J.H. MCGIVNEY"

MEMBER

I CONCUR

"K. MCDONALD"

MEMBER

T/0064/84
T/0018/86

**IN A MATTER UNDER THE CROWN EMPLOYEES COLLECTIVE
BARGAINING ACT, R.S.O. 1980, C.108**

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(The Applicant #1 and Intervener)

- and -

ONTARIO UNION OF COURT REPORTERS
(The Applicant #2)

- and -

The Crown in Right of Ontario
(Ministry of the Attorney General)
(The Respondent)

RE: FREELANCE COURT REPORTERS

Before:	P.C. Picher	Chairperson
	W. Walsh	Member
	J.H. McGivney	Member

Appearance for Applicant #1:	E. Shilton-Lennon Counsel Cavalluzzo, Hayes & Lennon Barristers and Solicitors
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Appearance for Applicant #2:	M. Horan Barrister and Solicitor
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Appearance for The Respondent:	D.W. Brown Counsel Crown Law Office, Civil Ministry of the Attorney General
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Hearing Date:	May 11, 1988
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DECISION

An application under section 40(1) of the **Crown Employees Collective Bargaining Act**, R.S.O. 1980 c.108 (**C.E.C.B.A.**), was filed with the Tribunal by O.P.S.E.U. on or about November 28, 1984. Section 40(1) of the **C.E.C.B.A.** provides as follows:

40. (1) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Tribunal and its decision thereon is final and binding for all purposes.

In its application, O.P.S.E.U. articulated the question being referred to the Tribunal as follows:

A question has arisen between the Ontario Public Service Employees Union and the Crown in Right of Ontario, more particularly the Ministry of the Attorney General, as to whether Teri Bertrand and all other persons performing the duties of Court Reporter in Provincial, County and District Courts, except any who are already acknowledged by the employer to be within the scope of the Public Service bargaining unit, are employees within the meaning of Section 1. - (1)(f) of The Crown Employees Collective Bargaining Act.

In accordance with Section 40. - (1) of the Act the Union is hereby referring this matter to the Tribunal for determination.

During the course of the Tribunal's processing of O.P.S.E.U.'s application for a determination of the employee status of the court reporters, an organization known as the Ontario Union of Court Reporters (hereinafter referred to as "O.U.C.R.") filed an application for certification with the Tribunal. Through its application dated April 4, 1986 O.U.C.R. seeks to obtain bargaining rights for the same freelance court reporters who are the subject of O.P.S.E.U.'S application under section 40(1) of **C.E.C.B.A.**

O.P.S.E.U. filed an intervention in respect of the application for certification on October 15, 1986 asserting that it already held bargaining rights for the freelance court reporters, which right it was seeking to have recognized through its previously filed section 40(1) application, herein under consideration.

In the circumstances the parties have agreed that the two applications should be, and the two hereby are, consolidated. The parties further agreed that the first issue to be addressed is the question of the employee status of the freelance court reporters. If it is found that they are independent contractors, as alleged by the Ministry, rather than employees within the meaning of the **C.E.C.B.A.**, as alleged by both applicants in this matter, then that finding would itself dispose of the application for certification. If they are found to be employees, then other issues relevant to the application for certification would arise for determination.

A. ISSUE:

In this Decision, then, the Tribunal will render a determination solely on the question of the employee status of the freelance court reporters.

Section 1(1)(f) of **C.E.C.B.A.** provides that,

1. (1) In this Act,

...

(f) "employee" means a Crown employee as defined in the **Public Service Act** but does not include,

[a list of ten exclusions are then set out which have not been put in issue in this proceeding]

The **Public Service Act**, R.S.O. 1980 c.418 defines "Crown Employee" in section 1(e) as,

1. In this Act,

...

- (e) "Crown Employee" means a person employed in the service of the Crown or any agency of the Crown ...

Both O.P.S.E.U. and O.U.C.R. maintain that the freelance court reporters are "crown employees" as defined by the **Public Service Act** and, therefore, are employees for the purposes of **C.E.C.B.A.** The Ministry, on the other hand, argues that they are independent contractors, not employees of the Crown, and are not, therefore, employees under **C.E.C.B.A.** For the purposes of this determination of employee status, the Ministry does not suggest that any of the freelance court reporters would be covered by any of the ten exclusions to employee status listed in subsections (i) through (x) of section 1(1)(f) of **C.E.C.B.A.** More specifically, the parties agree that the issue of how much less than full time some of the freelance court interpreters might work is not material to the determination of whether they are Crown employees.

Section (1)(1)(f)(vi) stipulates that an "employee under the **Act** does not include,

" a person not ordinarily required to work more than one third of the normal period for persons performing similar work except where the person works on a regular and continuing basis" ...

Whether any of the freelance court reporters might fall within this exclusion is an issue which the parties have agreed to put aside, pending the broader determination of whether freelance court reporters who work less than full time are Crown employees. In the circumstances, then, the Tribunal will consider the employee status of those freelance court reporters who work less than full time on the basis that they work "somewhat less than full time". Any diminution beyond the commitment of a freelance

court reporter who works somewhat less than full time is a matter that may subsequently be addressed on a case by case basis.

B. FACTS:

Prior to the hearing the parties came to the following Agreed Statement of Fact:

THE CROWN IN RIGHT OF ONTARIO
(Ministry of the Attorney General)

Applicant

- and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Respondent

1. The Ministry of the Attorney General for the Province of Ontario (hereinafter the Ministry) has sole responsibility for the administration of justice in the province and has been granted the power to superintend all matters connected with the administration of Ontario Courts, including the District Court, Provincial Court (Civil Division), Provincial Court (Criminal Division), and Provincial Court (Family Division).

Ministry of the Attorney General Act,
R.S.O. 1980, c.271, s. 5

Courts of Justice Act, S.O. 1984, c.11, s.91

2. The Attorney General has delegated Court administration to the Assistant Deputy Attorney General and Director of Courts Administration, Mr. Glenn H. Carter, and to the Deputy Director of Court Administration, Mr. Nestor Yurchuk. Together, with Mr. T.F. Moran, Manager of Court Reports ("the Manager"), they provide Court reporting services for all the Courts. The Manager bears direct responsibility for provision and supervision of Court Reporters' services.
3. Ontario Courts utilize two types of Court Reporters: staff and freelance. There are approximately 749 reporters

providing reporting services in the province, of which about 54 percent are freelance.

4. Many of the staff and freelance Court Reporters, and the vast majority of new Court Reporters of both types, are graduates of the Court Reporters course at George Brown College. That course was originally established at the request of the Ministry. The College receives ongoing input from the Ministry through an advisory board, which includes the Manager and Bill Nichols, supervisor of Court Reporters at the District Court in the Judicial District of York.
5. Appointments to staff Court Reporting positions are made as a result of competitions advertised in Topical Job Mart and/or local bulletin board circulation. Eligible candidates are interviewed by a panel, composed of the Manager and the Local Manager of Court reporting services (hereinafter the Local Manager), usually the Local Registrar of the Supreme Court or the Provincial Court Administrator. Where there is a supervising Court Reporter, he/she replaces the Local Registrar of Court Administrator on the panel. After a reasonable probationary period under supervision, the reporter, if his/her performance proves satisfactory, he/she will receive a regular appointment pursuant to the provisions of the **Public Service Act**, R.S.O. 1980, c. 418. An appointment can be revoked and revocation will occur if the individual in question fails to meet the standards set by the Ministry.

**Courts of Justice Act, 1984, S.O. 1984, c.11
s.94**

6. Previously, the staff Court Reporters performed the vast majority of the Court reporting work required by the Ministry of the Attorney General. They were supplemented by a small group of freelance reporters who filled in while staff reporters were ill or on vacation or when jurisdictions had visiting judges and there were not enough staff reporters to spare. In more recent times, with the increase in the demand for Court services and the hiring restrictions that prevail in the Ministry, freelance reporters are being used extensively. They continue to fulfill their traditional role and, in addition, are being used as semi-permanent and permanent replacements when there has been an attrition of staff reporters [who] in the normal course are not being replaced, or where additional courtrooms have been made available through the expansion of the Court system and the staff reporter complement has not been correspondingly increased.

7. Initially, the Inspector of Legal Offices arranged the provision of freelance Court Reporters on an *ad hoc* basis. More recently, the Manager has been given that responsibility permanently.
8. Suitable candidates for freelance reporting are identified locally, either through advertising or through administration identification of potential candidates. Many of the freelance reporters are solicited by the Ministry from graduates of the course at George Brown College.
9. After preliminary testing, full training and evaluation is provided by the Ministry. At the conclusion of a three month to six month probationary period and successful completion of the reporters certification program, a reporter is considered fully qualified to carry out all reporting functions. A list of qualified and preferred freelance reporters is maintained by the Manager. Qualified reporters are those who are approved for use by the Ministry and preferred reporters are those amongst the qualified reporters that the Ministry prefers to use.
10. When the Ministry is not approving of a Court Reporter or [his/] her actions, the following sanctions can be invoked:
 - 1) assignment to less desirable reporter positions within the Court system (i.e. Landlord and Tenant Court);
 - 2) removal from the preferred list;
 - 3) removal from the qualified list;
 - 4) failure to receive favourable consideration when being considered for a position as staff reporter;
 - 5) admonition by the Court Administrator in respect of conduct or decorum.

Many freelance reporters depend on employment with the Ministry for their entire income. In addition the staff reporters positions offer the vast majority of permanent full time jobs available to Court Reporters. Therefore, the Ministry's sanctions are extremely effective.

11. Freelance reporters can be divided into three groups:
 - 1) Freelance reporters that do work exclusively for the Ministry;

- 2) Freelance reporters that, with the permission of the Ministry, make their services available to clients other than the Ministry;
- 3) Freelance reporters that freely make their services available to other clients.

None of the reporters in groups 1) and 2) are contractually forbidden from working for employers other than the Ministry although they are expected to make themselves available to the Ministry in accordance with their personal commitment which may be 1,2,3,4 or 5 days per week and only if the Ministry does not require their services are they at liberty to make themselves available to others. It has been made clear to freelance reporters that failure to adhere to restrictions on their activity will cause the Ministry to invoke one of the sanctions listed in paragraph 10 above.

12. The freelance reporters that work exclusively for the Ministry are employed mainly at especially busy Metropolitan Courts (such as the District Court in the Judicial Districts of York and Peel). They are required to be at work for six hours per day, five days per week. They are relied on to supply Court Reporter services for particular courtrooms. Failure to attend on a regular basis and to perform properly will result in the invoking of one of the sanctions listed in paragraph 10 above.
13. Those freelance reporters that do not work exclusively for the Courts are commonly used in private practice for discoveries and by other statutory bodies. As a result of tax incentives, many such freelance reporters set up a home base reporting service and run it as a business enterprise.

Coroners Act, R.S.O. 1980, c.93, s.45(1)

Land Titles Act, R.S.O. 1980, c.230, s.19(1)

Municipal Act, R.S.O. 1980, c.302, s.2

Each freelance reporter has a home base or district and generally operates within a specific geographical area. Work performed on Examinations for Discovery usually takes place as part of the operation of the District Court House (except in busy metropolitan Courts described in paragraph 12 above). From time to time the manager of court reporters either directly or through the District

Court Administrator requests freelance reporters to work under the jurisdiction of a statute e.g. Coroners Act. These services are performed either at the District Court House or at the freelance court reporters home base depending upon a variety of factors including individual preference and available facilities.

14. Primarily, the obligation of a Court Reporter is two-fold:

- 1) the making of the record in Court;
- 2) the production of transcripts therefrom as required.

There is a continuing obligation on the reporter who made the record to produce the required transcripts to the limit of retention requirements, regardless of employment status. All staff reporters are required to swear an oath of secrecy and an oath of allegiance pursuant to the provisions of the **Public Service Act**. In addition, all Court Reporters are required to swear a reporter's oath which is subsequently filed with the Court.

Public Service Act, R.S.O. 1980, c.418, s.10

Judicature Act, R.S.O. 1980, c.223, s.103

15. Court Reporters are subject to the direction of the Chief Justice or Chief Judge of a Court, and to a presiding Judge or Master while the Court is in session. Reporters are required to adhere to such direction.

Courts of Justice Act, 1984, S.O. 1984, c.11, s.95

16. In an effort to maintain a uniform standard of Court reporting, the Court Reporters' Association in co-operation with the Ministry publish a manual of Court Reporting. The Ministry has assumed responsibility for printing and circulating the manual to all Court Reporters province wide. The manual is a comprehensive guide to the Acts and Regulations governing Court reporting and is continually updated by revised pages and by directive memos issued from the Manager to Court Reporters in general.

Manual of Court Reporting (Exhibit 1)

A large percentage of freelance court reporters are members of the Court Reporters Association.

17. In the event that a freelance reporter fails to adhere to the requirements set out in paragraphs 14,15 and 16, the Manager will invoke the appropriate sanction from among those listed in paragraph 10 above.
18. Freelance reporters are assigned by the Manager to a Local Manager in a given Court. Periodically the Manager will notify the Local Manager of a need for a Court Reporter in another Court. These notifications are usually posted and a request is made by the Local Manager for a Court Reporter to go on assignment to another Court. Unlike staff reporters, freelance reporters are under no contractual obligation to accept the assignment. However, failure, or repeated failure, to accept the assignment will result in the invoking of one of the sanctions set out in paragraph 10 above.
19. Staff reporters are salaried employees of the Ministry and members of the Ontario Public Service Employees Union. As such, they receive the wages and benefits (including: OHIP, dental care, long term disability protection, pensions and seniority rights) provided for in the collective agreement under the **Crown Employees Collective Bargaining Act**. In addition to salary, they are entitled to an allowance for any accommodation, meal or mileage expenses which they incur while on Ministry business. Staff reporters are also entitled to an over-time meal allowance.

O. Reg. 404/84

Finance and Accounting Directive - Re: Employer Expenses - Meals (Exhibit 2)

Ministry of the Attorney General Manual of Administration - Part 2.6.5 (Exhibit 3)

Memo - Mileage Allowances (Exhibit 4)

20. Freelance reporters are not members of the union and do not receive any entitlement under the collective agreement. They are paid a flat hourly rate for time worked. That hourly rate is much lower than the basic hourly wage portion of the remuneration received by the staff reporters. Freelance court reporters do not receive payment for travel time but do receive the same mileage and accommodation allowance received by staff reporters.
21. Freelance reporters often arrive at a particular Court House for a booked day of work, only to find that the particular matter is not proceeding for any number of

reasons (ie. the list has folded, a case has been adjourned, or a plea has been entered.) In such an instance the Ministry will allow a maximum three hours to be charged for that day and the next day (if scheduled) unless 48 hours notice of cancellation has been given to the freelance court reporter. The given reporter may very well have lost more revenue, as she will have been required to set aside the whole day for work. Frequently the freelance court reporter is requested to sign in at the Court House and indicate the time of arrival on the same book or pad that is used for all other employees.

22. Freelance reporters fees are paid on a per diem basis out of the Ministry's advance account. For audit purposes freelance reporters are required to complete a Daily Attendance Register in support of their weekly Invoice for Personal Service. Daily attendance is computed on the basis of hours spent in Court, and may include up to a maximum of half an hour grace period for set up and the same for wrap up, and any additional Ministry authorized time spent in Court beyond regular Court hours. The Invoice for Personal Service shows the billable time, unit price, and total amount for each day. The fees charged are in respect of time spent and in addition if a transcript is required the typing may or may not be done at either government offices or at the home of the freelance reporter; in any event payment is made on a per page basis in the Invoice for Personal Service. Invoices must be submitted to the Local Manager for signing and can be submitted on a monthly, bi-weekly, or daily basis. The local manager to whom the Invoices are submitted as aforesaid is the same person who monitors the staff court reporters; he submits the said invoices to the Attorney General Department for payment. Rates of pay for attendance of freelance reporters are fixed by regulation.
23. In addition to the remuneration described above, all Court Reporters (whether staff or freelance) are obliged by regulation to type up requested transcripts and to charge the transcript fee set by regulation. Staff reporters can type up transcripts during their regular working hours and thereby receive both salary and transcript fee for the same period of work. Freelance reporters, except those that work exclusively for the Ministry, have to type transcripts at times when they are not receiving any other payment. Such typing may be done either at the home of the freelance reporter or at the Court facility. Freelance reporters employed exclusively by the Ministry are occasionally paid their hourly rate while typing up transcripts but they are usually required to do this typing after scheduled working hours. Many freelance reporters use equipment owned by the Provincial Government which

include recorders, transcribers, steno-masks, steno-typers, and steno-books.

24. All Court Reporters are given access to Ministry photocopiers for making transcript copies, and all reporters must pay a usage charge of five cents per impression for those copies. The printing of transcripts for appeals is done for the Ministry of Government Services and reporters are not charged for such printing whether they be staff reporters or freelance reporters.
27. From time to time freelance court reporters are requested to perform clerical duties at the direction of the Court Administrator or manager in order to fill up the time upon which minimum payment is being made as indicated in paragraph 21 above.

C. PRINCIPLES FOR DISTINGUISHING EMPLOYEES FROM INDEPENDENT CONTRACTORS:

Numerous means of distinguishing employees from independent contractors emerge from the jurisprudence. The main ones are set out below:

1. The Control test;
2. The Fourfold test: a) control; b) ownership of tools; c) chance of profit; and d) risk of loss;
3. The Whose Business Is It test;
4. The Organization test;
5. The Statutory Purpose test;
6. The Algonquin List.

The details of these various tests were fully canvassed by the Tribunal in its recent decision concerning the determination of the employee status of the court interpreters and the clerks, bailiffs and staff employed in the Small Claims Court in

Ontario: **O.P.S.E.U. and the Crown in the Right of Ontario (Ministry of the Attorney General)**, file nos. T/55/84 and T/65/84, decision dated June 24, 1988. The same principles, which need not be repeated here, are applicable to the determination of the employee status of the freelance court reporters in the instant matter.

Some of these tests are overlapping, particularly as traditional approaches have matured to meet the ever-increasing sophistication of the work place in a highly technological age. Often, no single question or test will be determinative. Moreover, in a given context, some questions and/or some tests may not be particularly helpful, one way or the other. The most constructive approach is to consider the relationship in issue from several of the angles highlighted in the tests, whichever seem most applicable to the factual context at hand. This is precisely the approach taken by the Tribunal in its previous cases and is the one which we adopt in this case to determine whether the freelance court reporters are employees of the Ministry of the Attorney General or whether, instead, they are independent contractors.

D. DECISION:

Pursuant to s.91 of the **Courts of Justice Act**, 1984 S.O. 1984 c.11, as amended, the Attorney General superintends all matters connected with the administration of the Courts in Ontario. The Attorney General has delegated the responsibility for the administration of the Courts. As such, it is the Manager of Court Reports who bears direct responsibility for the provision and supervision of the court reporter services.

Forty-six percent of the approximate 749 court reporters are staff court reporters as opposed to freelance court reporters. They are appointed pursuant to the

provisions of the **Public Service Act**, are recognized by the Employer as employees of the Ministry, are members of the OPSEU bargaining unit and are covered by the relevant collective agreement.

The other 54 percent of the court reporters working in the Ontario court system are the freelance court reporters in dispute. They can be divided into three categories:

1. Freelance court reporters who work exclusively for the Ministry;
2. Freelance court reporters who, with the permission of the Ministry, make their services available to clients other than the Ministry;
3. Freelance court reporters who freely make their services available to other clients.

The Tribunal is fully satisfied that the first group of freelance court reporters are employees of the Ministry. They exhibit none of the hallmarks of independent contractors as highlighted in the various tests referred to above. On the contrary, they bear all the earmarks of employees. They are not carrying on their own businesses for themselves but rather are performing court reporting tasks to enable the Ministry to fulfill its legislative mandate of superintending the administration of the courts. Their integration into the Ministry's business of the administration of justice is revealed in part through section 94 of the **Courts of Justice Act** which stipulates that court reporters are considered necessary for the administration of the Courts. In addition, these court reporters are subject to the direction and control of the Ministry. They work full time and exclusively for the Ministry. They are required to work six hours a day, five days a week at an hourly rate of pay that is set by regulation. Failure to attend at work on a regular basis and to perform work properly will result in the imposition by the Ministry of specific itemized sanctions. As well, they are

subject to memos of a directive nature that are issued by the Manager to the court reporters and are inserted into the Manual of Court Reporting. If they fail to act in accordance with the directives they are subject to sanction by the Minister. They are further required to adhere to the directions of the Chief Justice or Chief Judge of a Court and/or to a presiding Judge or Master while Court is in session. They are not at liberty to establish their own policies and procedures to enhance their service as they see fit. They are obliged by regulation to type up requested transcripts and to charge a transcript fee set by regulation. There is little evidence of entrepreneurial activity. They have one relationship with one "purchaser" and not numerous relationships with diverse purchasers as would be expected of an independent contractor. Based on all the factors enumerated above, and having regard to the accepted principles for distinguishing employees from independent contractors, it is abundantly clear that the first group of freelance court reporters who work exclusively for the Ministry are employees of the Ministry, not independent contractors. They are employed in the service of the Crown and are employees within the meaning of **C.E.C.B.A.**

The Tribunal is further satisfied that the court reporters in the second group are employees of the Ministry. Although these court reporters do not work exclusively for the Ministry, they are expected to make themselves available to the Ministry in accordance with their personal commitment and may only work for other clients if they have the permission of the Ministry to do so. Unlike the typical independent contractor, they are not fully free to sell their services to the market generally and are subject to the overriding control and restrictions of the Ministry. If these court reporters fail to adhere to the Ministry's restrictions on their activity, the Ministry will invoke sanctions against them. Additional control by the Ministry is demonstrated by the fact that failure or repeated failure of these court reporters to

accept work assignments at courts other than their usual courts will result in the imposition of sanctions by the Ministry. Moreover, while the court reporters in the second group work for the Ministry they are subject to the Ministry's control over the manner and means of the performance of the work. For example, they are required by the Ministry to type their transcripts at specified times. They are not free to choose when and how they will do their work and simply produce a finished product, as might be typical of an independent contractor. If they fail to adhere to the directives and procedures in the Manual of Court Reporting and the directions from Justices of the Courts, they are subject to sanctions by the Ministry.

As with the first group and notwithstanding that these court reporters perform work for other clients when permitted to do so by the Ministry, they are not carrying on independent businesses of their own as would be the situation for the independent contractor but rather are a part of Ministry's business of administering the courts. Their integration into the Ministry's business is highlighted in numerous ways, one of which is the fact that they may be requested by the court administrator or manager to perform clerical duties as opposed to court reporting duties to fill up the time for which they receive minimum call-in pay when the need for their court reporting services is cancelled without sufficient notice. Being asked to perform the clerical duties of other employees when their court reporting services are not required is evidence of employee status and is not consistent with the status of independent contractors carrying on their own businesses. Moreover, the fact that many of the court reporters use equipment owned by the Provincial government such as recorders, transcribers, steno-masks, steno-typers and steno-books demonstrates a high degree of integration into the Ministry's business and is in the circumstances more consistent with employee status than that of an independent contractor.

Given the high degree of control exerted by the Ministry over the manner in which their work is done, given the restrictions placed on their ability to do work for clients outside the Ministry, given their substantial integration into the Ministry's business of administering the Courts, we must conclude that the court reporters in the second group are employees, not independent contractors, notwithstanding that they do not work exclusively for the Ministry.

The freelance court reporters in the final group are different from those in the second group in that they may freely make their services available to other clients. Working on a part-time basis for the Ministry as a court reporter does not undermine employee status or itself create an independent contractor. When a person works part-time for an employer, the individual may or may not be an employee depending on the nature of the employment relationship. In this situation, the evidence of the employment relationship for the third group, which carries much that is similar to the relationships exemplified in the first two groups, reveals the status of employees. While the court reporters work for the Ministry they are subject to its direction and control in essentially the same way as the second group, discussed above. While they work for the Ministry, they are integrated into the Ministry's business. They are not free to simply carry on their own businesses as they see fit. Many use equipment owned by the Provincial Government. Moreover, they may be requested to do the clerical duties of other employees to fill in time if the need for their court reporting services is cancelled without sufficient notice. Just as with the second group, the agreed facts indicate that their failure or repeated failure to accept assignments in courts other than their regular courts will result in the imposition of sanctions by the

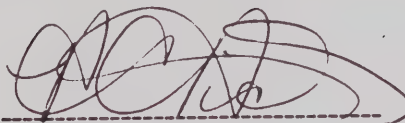
Ministry. As well, they work under Ministry-imposed restrictions as to when they can perform an important element of their work, the typing of transcripts.

It may be that some of the individuals will be excluded from employee status under **C.E.C.B.A.** by virtue of the application of section 1(1)(f)(vi) of the **Act** which stipulates that an employee under the **Act** does not include "a person not ordinarily required to work more than one third of the normal period for persons performing similar work except where the person works on a regular and continuing basis." As noted above, however, the parties have agreed to put aside the issue of potential exclusion based on the application of section 1(1)(f)(vi) for the purposes of the instant determination of employee status which has been therefore based on the premise that they work "somewhat less than full time". Issues of how much less than full time in any individual situation and the applicability of section 1(1)(f)(vi) may be subsequently addressed by the parties on a case by case basis.

Having regard to the accepted tests for distinguishing employees from independent contractors, the Tribunal is satisfied on the basis of the evidence that each of the groups of freelance court reporters in dispute are employees within the meaning of **C.E.C.B.A.**

Having rendered a determination on employee status, the Tribunal will, at the instance of the parties, proceed to determine any further issues that may arise in these applications.

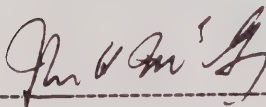
DATED at Toronto this 20th day of September, 1988.

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Pamela C. Picher
Chair

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W. Walsh, Member

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J.H. McGivney, Member



Ontario Public Service
Labour
Relations
Tribunal

Fonction Publique de l'Ontario
Tribunal Administratif
des Relations
du Travail

T/0064/84

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.103

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/64/84

T/18/86

BETWEEN: Ontario Public Service Employees Union
(Applicant #1 and Intervenor)

AND: Ontario Union of Court Reporters
(Applicant #2)

AND: The Crown in the Right of Ontario
(Ministry of the Attorney General)
(Respondent)

RE FREELANCE COURT REPORTER

BEFORE: Pamela C. Picher - Chair
J.H. McGivney - Member
W. Walsh - Member

APPEARANCES:

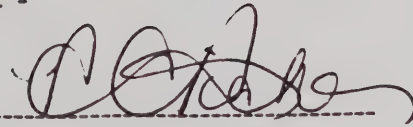
For Applicant #1: E. Shilton-Lennon - Counsel
Cavalluzzo, Hayes & Lennon
Barristers & Solicitors

For Applicant #2: Mr. David Zimmer - Counsel
for Michael G. Horan
Barrister & Solicitor

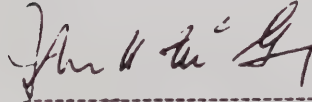
For the Respondent: Dennis Brown - Counsel
Crown Law Office (Civil)
Ministry of the Attorney General

HEARING DATE: June 28, 1989

- 2 -

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Pamela C. Picher - Chair

A cursive handwritten signature, likely of J. McGivney, written in dark ink. The signature is fluid and somewhat stylized, with a large initial 'J'.

J. McGivney, Member

A cursive handwritten signature, likely of W. Walsh, written in dark ink. The signature is fluid and somewhat stylized, with a large initial 'W'.

W. Walsh, Member



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T/0066/84

Crown Employees Collective Bargaining Act

R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

OPSEU (Collins et al)

Applicants

and

The Crown in Right of Ontario
(Ministry of the Attorney General)

Respondent

Before:

M.G. Mitchnick
M. Sullivan
J.H. McGivney

Alternate Chairman
Member
Member

For the Applicants:

B. Hanson
Counsel

For the Employer:

D.W. Brown
Counsel

Hearings:

April 14, 1987
October 26, 1987

D E C I S I O N

This is an application under section 40(1) of the Crown Employees Collective Bargaining Act, asking the Tribunal to determine whether the persons employed by the Ministry of the Attorney-General as "provincial prosecutors" are "employees" for the purposes of the Act. There are both "classified" and "unclassified" persons performing this job function, but the parties have agreed that the Tribunal need only determine the status of the "classified" group for the purposes of this application.

The parties spent a good deal of time at the outset considering and discussing how the potential evidence of the many provincial prosecutors involved could be presented to the Tribunal in an efficient yet comprehensive form, particularly having regard to the fact that the duties of a provincial prosecutor, and even the Job Descriptions formally setting those out, vary from location to location around the province. Mr. Hanson on behalf of the Union was particularly concerned that the Tribunal's determination be based, as is normal, on duties that are actually performed by the provincial prosecutors. In the Welton case (T3/76), for example, the Tribunal observed, at

page 4:

At the outset we wish to confirm two matters that were suggested during the hearing. First, we are more concerned with the actual duties and responsibilities of persons rather than what is stated in a position specification or suggested by an organization chart. While written specifications and charts are necessary to facilitate administration and to provide government operations there may be times when the theoretical scheme does not coincide fully with the duties and

responsibilities actually performed by those concerned. The written organizational scheme may have some weight but the more persuasive facts will be those which describe the actual duties and responsibilities. In our opinion what a person actually does will be given primary consideration in making an assessment under section 38 [now 40].

That was a case dealing with the status of one particular individual, however, (as, for example, was the case of Bertolo, T4/76) and Mr. Brown for the employer takes the position that, while variations do exist in practice from location to location, the evidence supports the conclusion that each provincial prosecutor remains subject to being called upon to perform any of the responsibilities of a provincial prosecutor in the province, and Mr. Hanson does not really disagree with that. Having considered the evidence given viva voce, the various Job Descriptions filed for the position from around the province, and the typed synopses of the parties' interviews of 6 of the other incumbent prosecutors, we find that the Job Descriptions themselves do not contain any significant variations, and that really any one of them can be taken as fairly reflecting the responsibilities of the position. Clearly there are variations in the mix of duties, and the percentage of time spent working under particular statutes, for example, depending on geographic circumstance and the level of staffing for the area, but nothing in either the evidence or the submissions of the parties suggests to us that any such variations are significant to our conclusion. The Job Description for the County of Simcoe, to take an example, provides:



Government
of Ontario

Position Description

CSC 015

1. Position Title PROVINCIAL PROSECUTOR	2. Position Code 02-6171-07	3. Manpower Planning Code
4. Reason for Submission Revision of duties	5. Supersedes Position Code Number 02-6171-07	Date 5/6/79
6. Ministry & Division Attorney General; Criminal Law		
7. Branch Crown Attorney's		
8. Section & Location County of Simcoe, Barrie		

9. Title of Immediate Supervisor Crown Attorney, Simcoe	10. Supervisor's Position Code 02-6171-01
11. Number of Places 1	12. Number of Positions Supervised n/a Directly n/a Indirectly
	13. Number of Places Supervised n/a Directly n/a Indirectly

14. Purpose of Position (Why does this position exist?)

To assist the Crown Attorney in the administration of justice by conducting the prosecutions of cases for offences under Provincial Statutes and selected Federal Statutes in Provincial Courts. To conduct appeals related to Provincial Statutes in Provincial Court. To conduct bail hearings.

15. Statement of Major Responsibilities (How is purpose achieved?)

Conducts prosecutions under Provincial Statutes and selected Federal Statutes in Provincial Offences Courts including assigned Courts outside own County; conduct prosecutions in Juvenile Court before a Provincial Court Judge.

Appears on behalf of the Crown on Appeals with regard to offences under Provincial Statutes in Provincial Court; for Bail Hearings before a Justice of the Peace or Provincial Court Judge; assisting others as required regarding Bail Reviews and appeals in the Ministry or at federal level.

Makes representation on behalf of the Crown at Coroner's inquests.

Evaluates charges to determine that they have been sufficiently investigated and all evidence is collected.

Prepares cases for presentation before the Court; reviews statements of witnesses and admissibility of evidence and continually up-dates knowledge of developing law and its practices.

Provides liaison, advice and guidance to police departments, members of the legal profession, officials of this and other Ministries, the

(Continued on page 2)

16. Qualification Criteria

The ability to apply knowledge of legal practices, procedures, theory and practice of advocacy, relevant Statutes and case law in the conducting of prosecutions. Strong organizational and communicative abilities, plus integrity, tact and persuasiveness.

Knowledge Thorough knowledge of legal practices & procedures, the theory & practice of advocacy, plus extensive knowledge of all relevant Provincial Statutes & case law relative to the prosecutions of offences under these Statutes, including selected Federal Statutes in order to conduct prosecutions & present legal arguments. Thorough knowledge to conduct disclosure for trials with Defence Counsel & to conduct prosecutions in Juvenile Court & Family Court; also knowledge to argue law on appeals before Provincial Court Judge in Provincial Offences Court. The ability to organize, particularly in the determining of the sequence of trials & the order in which witnesses are called. Good communicative skills combined with tact, persuasiveness, objectivity & integrity in order to deal effectively with defendants, legal profession, Justices of the Peace & Provincial Court Judges.

(Continued on Page 2777)

Judgement

The incumbent exercises judgement in Provincial Court, including Juvenile Court & Family Court in: deciding whether the Crown should prosecute; whether certain evidence is admissible; what charge to lay; whether to withdraw a charge; what position to take as to sentence; whether to accept a plea to a lesser offence; whether to request or consent to adjournments; whether to recommend or argue an appeal; what form disclosure should take. The incumbent when exercising judgement, has access to the Crown Attorney and Assistant Crown Attorney, when they are available, but, while in Court, the incumbent must deal with all problems as they arise. The only resources available are the Attorney General's guidelines relative to plea discussions as outlined in the Provincial Prosecutor's Handbook and the disclosure guidelines.

Accountability

The incumbent is accountable for the conduct of prosecutions of offences and appeals under relevant Provincial Statutes and selected Federal Statutes before Provincial Judges. This includes accountability to review case law and argue law on appeals, conduct of disclosure and prosecutions in Juvenile and Family Courts.

Errors in judgement could result in the miscarriage of justice, inconvenience to the public, increased costs, public dissatisfaction with the administration of justice and embarrassment to the government.

Contacts

Internal: Regular contact with Provincial Court Judges, Justices of the Peace and Court Administrators for the scheduling of trials. Contact with Crown Attorney and Assistant Crown Attorney for legal advice.

External: Contact with police forces, and certain ministries such as the Ministry of Transportation & Communications and the Ministry of Natural Resources to give advice and exchange information concerning prosecutions. Regular contact with the Defence Counsel to discuss prosecutions and make disclosure, with Crown witnesses and expert witnesses (forensic scientists, medical doctors, etc.) to review evidence and with the general public to give advice concerning the prosecution of offences.

I certify that the foregoing is an accurate description of the position.

Supervisor's Signature

Title

Crown Attorney

Date

10/5/82

I certify

Branch Director's Signature

Date

15 May 1982

STATEMENT OF MAJOR RESPONSIBILITIES - (CONT'D)

...general public, coroners and Justices of the Peace based on knowledge of the requirements and procedures under the Provincial Offences Act.

Conducts research for the Crown Attorney to assist in preparation of evidence in such cases as criminal negligence causing death, dangerous driving, etc.

Conducts disclosures with defence counsel for all Provincial Offences under, e.g. Game and Fish Act, Highway Traffic Act, etc. in Provincial Offences Court.

Acts as a resource person for training seminars (regarding Provincial Offences Act, Rules of Evidence, gathering of evidence, etc.) conducted for police officials and other interested parties; maintaining the Crown Attorney's law library and related publications, etc.

KNOWLEDGE - (CONT'D)

Continuous up-dating of knowledge essential to conduct research on assigned criminal cases for the Crown Attorney, act as a resource person & to draft wordings for Information re new or amended Acts.

That description, together with the oral and written evidence of the provincial prosecutors, establishes to our satisfaction the elements of the provincial prosecutor's responsibilities upon which the government bases its argument.

Unlike Crown Attorneys and Assistant Crown Attorneys, "provincial prosecutors" need not be lawyers, and are concerned with the prosecution of offences under provincial statutes (principally the Highway Traffic Act), including offences which can lead to incarceration as a penalty. The provisions setting out the various levels of prosecutors within the province are contained in the Crown Attorneys Act, and state in their material parts:

1. (1) The Lieutenant Governor in Council may appoint a Crown attorney for each county and for each provincial judicial district and such Crown attorneys and assistant Crown attorneys for the Province as he considers necessary.

(2) The Crown attorneys and assistant Crown attorneys appointed for the Province or a county or provisional judicial district thereof shall act anywhere in the Province as directed by the Deputy Attorney General.
2. The Lieutenant Governor in Council may appoint one or more assistant Crown attorneys for any county or provisional judicial district who shall act under the direction of the Crown attorney and when so acting has the like powers and shall perform the like duties as the Crown attorney.
4. No person shall be appointed a Crown attorney or assistant Crown attorney or act in either of such capacities who is not a member of the bar of Ontario.
7. (1) The Attorney General may by order authorize persons appointed under the Public Service Act to be provincial prosecutors.

(2) A provincial prosecutor may be a person who is not a member of the bar.

(3) A provincial prosecutor shall act anywhere in Ontario as directed by the Director of Crown attorneys of the Ministry of the Attorney General.

(4) A provincial prosecutor shall conduct such prosecutions for provincial offences and offences punishable on summary conviction as are delegated to him by the Crown attorney for the county or provincial judicial district in which the provincial prosecutor acts and shall be subject to the direction and supervision of the Crown attorney.

(5) Every provincial prosecutor before he enters upon his duties shall take and subscribe before a Crown attorney the following oath:

I swear that I will truly and faithfully, according to the best of my skill and ability, execute the duties, powers and trusts of provincial prosecutor for Ontario without favour or affection to any party: So help me God.

Section 9 provides the same oath of office for Crown attorneys and assistant Crown attorneys as for provincial prosecutors, and section 11 adds:

11. Every Crown attorney and every provincial prosecutor is the agent of the Attorney General for the purposes of the Criminal Code (Canada).

In addition, under the Provincial Offences Act,

s.1(1) ...

(h) "prosecutor" means the Attorney General or, where the Attorney General does not intervene, means the person who issues a certificate or lays an information and includes counsel or agent acting on behalf of either of them.

From a comparison with the Job Description filed for Crown attorneys and Assistant Crowns, it is apparent that the Provincial Prosecutors perform essentially the same roles in the cases that they handle as do the other two levels of prosecutors.

Indeed, the literature filed by the Ministry tends to deal with the role of the "prosecutor" at large, and does not distinguish amongst the various levels of prosecutor involved. The Provincial Prosecutors exercise their own discretion with respect to the initiation of proceedings, to the calling of cases, and to the withdrawal of a charge. Similarly, they exercise a discretion with respect to plea bargaining (although guidelines may issue from the Ministry), and are entirely free to make up their mind with respect to what sentence to seek, what pre-trial disclosure is appropriate, and what position to take on bail at a "show cause" hearing (including Criminal Code matters as serious as attempted murder), and if agreeing to bail, on what terms (see section 457 of the Criminal Code). As Brian Grosman observed in "The Role of the Prosecutor" (1968), 11 Can. Bar J. 580, at 584, on this latitude in general:

Opportunities for negotiation between the defence lawyer and prosecutor on questions of charge reduction, guilty pleas and other available alternatives are characterized by a flexibility that does not prevail at trial.

Many cases at the provincial offence level are not defended by lawyers, and, as Ms. McGoey in particular explained, it is up to the Provincial Prosecutor to exercise his or her professional judgment in determining what evidence ought to be put in, in the interest of ensuring a fair trial. With respect to appeals, the evidence varies as to whether the Provincial Prosecutor can decide on his or her own whether to launch an appeal, but it is clear that the Prosecutor at the very least fulfills the role of

making recommendations with respect to appeals, and we accept the evidence of Mr. Bhodal that those recommendations are normally followed. The Provincial Prosecutors, are, in addition called upon on a regular basis to give advice to the police, to justices of the peace, and to members of the public at large. For all of these responsibilities, there exists, as the Job Description indicates, the opportunity for consultation with higher-ranking officers of the Crown, but it is largely up to the individual Prosecutor when or whether to do so. As Mr. Peltz, for example, noted: "We're supposed to meet with the Crown weekly, but do not do so".

In all, we find it to be clear on the evidence that the Provincial Prosecutors are called upon to exercise a wide scope of professional judgment as part of the system of justice of this province. But is that sufficient to exclude them from coverage by the present legislation governing the collective-bargaining rights of employees of the Ontario Public Service?

To engage in collective bargaining under the Crown Employees Collective Bargaining Act, a person must be a Crown employee as defined in the Public Service Act (as the Provincial Prosecutors are) and must not fall under one of the excluded categories which the Crown Employees Collective Bargaining Act provides. Thus section 1(1)(f) of the Act sets out:

1. (1) In this Act, ...

(f) "employee" means a Crown employee as defined in the Public Service Act but does not include,

- (i) a member of the Ontario Provincial Police Force,
- (ii) an employee of a college of applied arts and technology,
- (iii) a person employed in a managerial or confidential capacity,
- (iv) a person who is a member of the architectural, dental, engineering, legal or medical profession entitled to practice in Ontario and employed in a professional capacity,
- (v) a student employed during the student's regular vacation period or on a co-operative education training program,
- (vi) a person not ordinarily required to work more than one-third of the normal period for persons performing similar work except where the person works on a regular and continuing basis,
- (vii) a person engaged under contract in a professional or other special capacity, or for a project of a non-recurring kind, or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help,
- (viii) a person engaged and employed outside of Ontario,
- (ix) a person employed in the office of the Provincial Auditor, or
- (x) a person employed by or under the Tribunal or the Grievance Settlement Board;

It is agreed that the only section relevant here is section 1(f)(iii), and that section is further defined as follows:

1. (1) ...

(1) "person employed in a managerial or

confidential capacity" means a person who,

- (i) is employed in a position confidential to the Lieutenant Governor, a Minister of the Crown, a judge of a provincial court, the deputy head of a ministry of the Government of Ontario or the chief executive officer of any agency of the Crown,
- (ii) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the Government or an agency of the Crown or in the formulation of budgets of the Government or an agency of the Crown,
- (iii) spends a significant portion of his time in the supervision of employees,
- (iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
- (v) adjudicates or determine claims for compensation which are made pursuant to the provisions of any statute,
- (vi) is employed in a position confidential to any person described in subclause (i), (ii), (iii), (iv) or (v),
- (vii) is employed in a confidential capacity in matters relating to employee relations including a person employed in a clerical, stenographic or secretarial position in the Civil Service Commission or in personnel office in a ministry or agency of the Government of Ontario, or
- (viii) is not otherwise described in subclauses (i) to (vii) but who in the opinion of the Tribunal should not be included in a bargaining unit by reason of his duties and responsibilities to the employer.

The employer at this stage of the proceedings has further acknowledged that the only category into which the persons here

in dispute can be argued to fall is the "omnibus" clause, clause (viii).

In the Ministry's submissions and in the literature (on the office of the Crown prosecutor in general), the essential theme is that the prosecutor at all levels acts in a quasi-judicial capacity, unlike any other "employee" of the Public Service, both as an officer of the public and an officer of the Court. The oft-quoted remarks of Mr. Justice Rand, for example, in Boucher v. The Queen (1954), 110 C.C.C. 263, at 270, are referred to us:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.

And as Zuber, J. A. observed, in R. v. Savion and Mizrahi (1980), 52 C.C.C. (2d) 276, at 289:

But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice...

There must, in the employer's submission therefore, be an independence and a freedom from overt association with any external group, be it corporate or union, so that justice not only be done, but justice be seen to be done. Quite apart from any contact with the Union itself in a proceeding, the employer

points out, there are 50,000 Union members in the bargaining unit with whom the potential for conflict exists as an inherent part of the Provincial Prosecutor's role. And, the employer argues, it is precisely this kind of unique conflict of interest, not readily fitting anywhere else in the exclusions to the Crown Employees Collective Bargaining Act, for which the Legislature has reserved to the Tribunal the "omnibus" power to exclude under section 1(1)(1)(viii). There are, the employer submits, no fetters on the discretion of the Tribunal as to how and when it exercises its exclusionary powers under that section, and the applicant trade union is improperly attempting to create such fetters by arguing that the exclusion should be confined only to questions of a "managerial" or "confidential" nature.

The first problem the employer faces in this argument is that the "omnibus" clause, section 1(1)(1)(viii), is in fact made part of the exclusion applying to persons "employed in a managerial or confidential capacity": it is not a separate, independent head under the exclusions to "employee" set out in section 1(1)(f), and to that extent there appears to be merit in the submission of the Union that section 1(1)(1)(viii) must be read together with the other specific grounds for "managerial" or "confidential" exclusion which go before. Dealing with virtually identical provisions in section 1(1)(a) to (g) of the Public Service Staff Relations Act, the PSSRB in the Lemieux case, for example, observed:

21. There may be some elements in Mr. Lemieux's duties that could be related to what is "described" in

paragraphs (c), (d) or (f) of the definition of a "person employed in a managerial or confidential capacity". They do not, however, add up to a position the duties and responsibilities of which would warrant his exclusion from the bargaining unit. In the application of paragraph (g), the Board can be no less rigorous in its judgment of the factors that may be relevant to the exercise of its discretion than when it is determining designations under the other more specific paragraphs of the definition. It must be persuaded that there is a real likelihood of conflict between Mr. Lemieux's duty to the Employer and his interests as a member of a bargaining unit.

In section 1(1)(l)(y), for example, the Legislature specifically turns its mind to the question of persons acting in potentially a quasi-judicial capacity, and cuts it off at the level of the actual decision-maker. And our own Tribunal in the Williams case (T10/76) noted, at page 5:

...it is our view because of the rather complete code defining the managerial exclusions in the previous part of the subsection that Subsection 1(1)[1](viii) be used only in exceptional circumstances.

There have in fact been decisions of the PSSRB which, because the "omnibus" clause forms part of the "managerial/confidential" exclusion, have appeared to limit the scope of its application to persons otherwise forming part of the "managerial team". In Lemieux, however, the Bureau clearly interprets the clause as applying to any previously undefined form of conflict of interest between responsibilities to the employer and affiliation with a bargaining unit; but even then, as the Union, notes, the decision narrows that ground to "proven conflict of interest". In Lemieux itself the individual in dispute was part of an audit team which was expected to make

recommendations both on program and on administration. The Bureau was not satisfied that a real likelihood of conflict of interest had been demonstrated, noting, at paragraph 22 of the decision, that "Mr. Lemieux's role is essentially a technical one and he undoubtedly performs it with a high degree of professional integrity".

In the Williams case before this Tribunal the disputed individual was an Industrial Relations Officer for the Ministry of Industry and Tourism, assisting small businesses with problems such as sales, finance or marketing, or in locating in the geographic area in general. His work had included a couple of instances where he had been involved in discussions with companies who contemplated closing because of union problems, and Mr. Williams himself admitted "that he does not advertise his union involvement although there might be some situations where he might be less effective if it were known he was a member of a union". About that the Tribunal wrote, at page 7:

In truth the evidence indicates that Mr. Williams has not been handicapped in performing his duties as a result of his membership in the bargaining unit although there is a suggestion that he has been discreet about publicizing his involvement.

In finding Mr. Williams to be an employee, therefore, the Tribunal went on to note that there was "an extensive area of service rendered by Mr. Williams that would not be affected by his involvement in a bargaining unit", and that those in fact were the "primary activities" of his job. Should real problems in fact develop for Mr. Williams and his job in the future, the

Tribunal observed that there were avenues available to the employer to deal with that at the time.

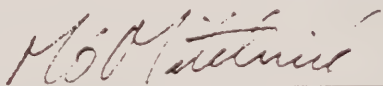
In our own case, the need for professionalism and integrity on the part of the provincial prosecutors is obvious. But, just as obviously, putting aside any particular question over who the defendant is, that professionalism and integrity can be expected to exist in the prosecutor irrespective of any affiliation with or membership in a trade union. And at the very least, the vast majority of cases in connection with which the Provincial Prosecutor is expected by the employer to carry out his or her daily activities will not be cases in which the identity of the defendant causes the employer concern. The employer's expressed concern is where the Union or one of its members is the subject matter of the existing or potential prosecution. In that regard, the Union argues that the example of a prosecution against the Union has to be distinguished from that involving an individual citizen, who simply happens to be a member of the Union, and from the point of view of the level of public sensitivity, we would be inclined to agree. But the fact is that there is nothing in the evidence to suggest that there has ever been a problem with either type of situation. That may provide an indication that the frequency of such charges, involving even individual members of the Union, is insignificant in comparison to the overall case exposure of the Provincial Prosecutors; or it may reflect the fact that there simply tends to be no awareness of (or issue over) the fact that an

accused or potential accused happens to be a member of the Ontario Public Service Employee's Union. Either way, while the potential for such a case involving either the Union or one of its members indisputably exists, the evidence hardly leads one to the conclusion that that situation exists to any significant degree, in the overall scheme of the Provincial Prosecutors' responsibilities, or has posed a real problem to the employer's administration of justice. In that regard we also find interesting the evidence of Arnold Renshaw, a Provincial Prosecutor in the City of Kitchener, dealing with police prosecutions. Police officers often serve as traffic court prosecutors as well (and are not thereby excluded from membership in their bargaining unit), and the transcript of Mr. Renshaw's evidence indicates that he "attends at other jurisdictions approximately twice a month to prosecute cases where police officers were involved in accidents". We have no other information than that, but that statement would appear to say that where a party to an accident is a police officer, Mr. Renshaw is brought in from outside to handle the case instead of another police officer - or possibly the local Provincial Prosecutor - we cannot tell from the transcript. In any event, that suggestion in the evidence is reflective of the same kind of option that appears available in isolated cases of conflict for a Provincial Prosecutor belonging to an OPSEU bargaining unit. All Crown attorneys and Assistant Crown attorneys in the province are, as Mr. Hanson notes, expressly excluded from the Act, by

virtue of section 1(1)(f)(iv) and the requirement that they be members of the bar, and it would seem, therefore, that the means of handling sensitive cases, to the extent such may arise, are readily available to the employer, without having to deny access to collective bargaining to an entire class of public servants for whom no real or regular conflict of interest has been shown to exist.

We are accordingly not of the view that the classified staff occupying the position of Provincial Prosecutors should be excluded from the public-service bargaining unit by reason of their duties and responsibilities to their employer, and find that they are "employees" for the purposes of the Crown Employees Collective Bargaining Act.


Dated at Toronto this 14th day of April, 1988.



M. G. Mitchnick - Alternate Chairman



M. Sullivan - Member



J.H. McGivney - Member



ONTARIO PUBLIC SERVICE

LABOUR
RELATIONS
TRIBUNAL

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T/71/84

B E T W E E N :

Ontario Liquor Boards Employees' Union

Applicant

- and -

The Crown in Right of Ontario
(Liquor Control Board of Ontario)

Respondent

B E F O R E :

O. B. Shime, Q.C., Chairman
E. C. Witthames and
Louise Binder, Tribunal Members

A P P E A R A N C E S :

For the Applicant Union: Mr. M. Levinson, Counsel and others

For the Respondent: Mr. R. J. Drmaj, Counsel and others

In this matter, the Employer, pursuant to section 40(2) of the Crown Employees Collective Bargaining Act requested the Tribunal to determine whether certain matters proposed by the Union came within the scope of collective bargaining. The Union objected that the Employer's application was untimely in view of the time that the Employer had notice of the proposals. Section 40(2) of the Act provides as follows:

- 40.(2) If, in the course of bargaining for a collective agreement or during proceedings before a board of arbitration, a question arises as to whether a matter comes within the scope of collective bargaining under the Act, either party or the board of arbitration may refer the question to the Tribunal and its decision thereon is final and binding for all purposes.

In our view, the preliminary objection is fully answered by section 40(2) of the Act which contemplates a referral to the Tribunal both "in the course of bargaining for a collective agreement" or "during proceedings before a board of arbitration". Also, the Act contemplates a referral by the board of arbitration to the Tribunal. The clear implication from the Act is that it is appropriate to refer matters to the Tribunal up to and during proceedings before a board of arbitration.

Moreover, and as a practical matter, either party may choose not to challenge the other party's legal position during bargaining. It may well be that during the give-and-take of bargaining the adopting of a strict legal position on some issues may upset the balance and diminish the possibility of settlement in other

areas. Also, the parties may agree that proposals that appear to be beyond the scope of bargaining fall within the scope of bargaining or, alternatively, there may be some agreement that if disputed proposals were amended they would be appropriate. All that this comes to, is that the mere fact that proposals have been on the bargaining table for some time, in and by itself, does not preclude a referral to the Tribunal when a negotiated settlement is not achieved and matters then crystallize for presentation to an arbitration board.

For these reasons the dismissal of the preliminary matter which was communicated to the parties is confirmed.

We now turn to the merits. The Union has proposed a limitation on transfers and the proposal is as follows:

- 16.5 (d) Where transfers are initiated by the Boards, at least twelve (12) months must have elapsed between transfers.

The employer, while admitting that transfer is a legitimate condition of employment, objects to the proposal on the basis that the restriction of time is applicable to "appointment", "complement" and "assignment", which is a management function.

Under section 7 of the Act, the Union is entitled

to bargain about "transfers" while under section 18 of the Act, the Employer has the right to determine "appointment", "complement" and "assignment". It is clear that prima facie the proposal is valid and the only issue before us, as indicated in some of our earlier decisions, is whether the nature and thrust of the proposal is such that it does not properly fall within section 7 of the Act.

In our view the proposal is legitimately directed towards transfer and while the effects of the time restriction are such that they may touch on areas reserved to the Employer under section 18, it is our view that the proposal is a valid one which may properly be dealt with by a board of arbitration.

The second and more difficult issue is contained in the Union's proposal with respect to part-time or temporary employees. That proposal is as follows:

"The Boards also agree to recognize the Union as the exclusive bargaining agent for part-time store cashiers and temporary employees. A Temporary employee is one who is employed for less than twenty-four (24) hours a week. The period over which a determination of whether an employee works less than twenty-four (24) hours a week, shall be a four (4) week period prior to any question being raised as to the status of an employee. Should it be found that such an employee works in excess of twenty-four (24) hours a week, the Boards agree to post a full-time position in accordance with Article 30. Until such posting is completed, the temporary employee shall be paid full-time rates for the job performed. Part-time store cashiers are those who are

primarily engaged in taking cash from customers. The wages and working conditions of part-time store cashiers and temporary employees are set out in Article 30."

Since 1978, the Employer has granted recognition to the Union as the bargaining agent for part-time cashiers and temporary employees. We pause here to note that the Ontario Labour Relations Act, R.S.O. 1980, c. 228, s. 60 expressly recognizes that voluntary recognition may be granted by an Employer to a trade union. Section 60(1) provides as follows:

60(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in section 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

See also the Canadian Union of Industrial Workers and Gilbarco Employees' Union and Gilbarco Canada Ltd., [1971] OLRB Rep. 155.

A similar provision does not exist under the Crown Employees Collective Bargaining Act. Moreover, the Crown Employees Collective Bargaining Act differs slightly from the Ontario Labour Relations Act in that, under section 4 of the Crown Employees Collective

Bargaining Act, a representation vote by employees in every case, under the supervision of the Tribunal is mandatory. Thus, the route to representation rights is more circumspect under the Crown Employees Collective Bargaining Act than under the Ontario Labour Relations Act.

The result of the differences under the Act is to prevent a board of arbitration from granting representation rights to a group of employees where no representation rights had existed previously. But that does not prevent the parties voluntarily extending bargaining rights by direct negotiation. It may very well be that in the trade-offs that occur during bargaining that it might be mutually beneficial to the Employer and the Union to agree to recognize the Union as the bargaining agent for certain employees, rather than to go through the procedures under the Act. In such a case, the Employer or Union may be ultimately estopped from asserting their rights. Whether affected employees are able to complain is a matter that need not be dealt with in this application because we are presented with a situation where the Union has been granted voluntary recognition by the Employer with respect to certain employees.

The recognition clause of the agreement provides under section 1.1(b) that:

"Solely for the matters dealt with in
Article 30, Part Time Store Cashiers

and Temporary Employees, the Boards recognize the Union as the exclusive bargaining agent for employees employed as part-time store cashiers and temporary employees."

-

Article 30 deals with hours of work, overtime, rest period, acting pay, clothing, vacation pay, vacation time and job consideration.

The Employer claims that the Union's proposals relate to excluded persons. The Employer further maintains that those employees who fall within Article 1.1(b) have neither legislative definition nor recognition definition under the collective agreement.

The Union maintains that its proposal is an attempt to clarify when a temporary employee becomes a full-time employee under the agreement. Once that is defined, the wages and working conditions which attach to the two classes of employees, i.e., full-time and temporary will flow.

It is our view that the arbitration board cannot expand the bargaining unit beyond that which is contained in the collective agreement. Also, it is our view that under section 3 of the Act, that bargaining units are defined by either the regulations or the Tribunal and that a board of arbitration does not have the authority to redefine a bargainin unit.

However, once voluntary recognition has been granted, there is no reason why the union is not entitled to bargain about those matters that are permitted under section 7 of the Act.

The Employer was the one that recognized the Union as the bargaining agent. Once they have extended that recognition and bargained with the Union about wages and working conditions, it seems unjust to allow the Employer to insist on its strict legal rights.

In Combe v. Combe, (1951), 2 K.B. 215; (1951) All E.R. 767, Denning, L.J., said:

"The principle stated in the High Trees case ...does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties...The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him; but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.

See also Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd. (1955) 2 All E.R. 657 (HL).

In our view the Employer must accept the existing legal relationship.

The proposal put forth by the Union appears to be an attempt to give further definition to those persons who are full-time and those who are temporary and to extend the rights of temporary employees by refining the concept of who is full-time and who is temporary. There is nothing, in our view, which prevents a board of arbitration from deciding which persons now represented by the union fall into one area as opposed to the other; that does not extend the bargaining unit and grant representation rights where none previously existed. It merely redefines an existing situation and that is permissible. The proposal is allowed.

DATED at Toronto this 14th day of May, 1985.



For the Tribunal



Ontario Public Service Fonction Publique de l'Ontario
Labour Tribunal Administratif
Relations des Relations
Tribunal du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/76/84

BETWEEN:

Mr. Robert H. Wilson

Complainant,

- and -

Ontario Public Service Employees
Union

"Respondent Union"

- and -

The Crown in Right of Ontario
(Ministry of Education)

"Respondent Employer"

BEFORE:

Pamela C. Picher, Chairperson
W. Walsh, Member
R. Gallivan, Member

FOR THE COMPLAINANT:

R. Wilson

FOR THE RESPONDENT UNION:

S. Goudge
R. Wells

FOR THE RESPONDENT EMPLOYER:

L. Kolyn

HEARING DATES:

May 12, 1986
July 11, 1986
January 8, 1987
January 12, 1987

DECISION

Mr. Robert Wilson has lodged a complaint under the **Crown Employees Collective Bargaining Act**, R.S.O. 1980 c.108, as amended, alleging that the Ontario Public Service Employees Union has acted in breach of its duty of fair representation as set out in section 30 of the **Act**, which provides as follows:

An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

The complainant further maintains that the Ministry of Education, as his employer, acted contrary to its obligations under section 29(2)(a) of the **Act** in respect of his dismissal in December of 1972 and his resignation in December of 1975. Section 29(2)(a) reads as follows:

(2) The employer or any person acting on behalf of the employer shall not,

(a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;

By way of remedy Mr. Wilson seeks declarations of violations of the Act, letters of admissions of wrongdoing, reinstatement and compensation for all losses, including punitive damages, plus interest and adjustments for inflation.

The specific incident giving rise to this complaint is a letter of resignation signed by Mr. Wilson on December 10, 1975. Through the resignation Mr. Wilson agreed to withdraw his grievance against his discharge in December of 1972 in exchange for a clear record of employment. Mr. Wilson's resignation letter provides as follows:

. . .

December 10, 1975

Ministry of Education
Mowat Block, Queen's Park
900 Bay Street
Toronto, Ontario

Attention: Mr. A.H. Glendenning
Director, Personnel Branch

RE: Resignation from Employment

Dear Sir

I ask that you accept this letter as my notice of resignation from employment with the Ministry of Education. Date of resignation to be effective December 31, 1972.

Upon acceptance of my resignation my current grievance against 'unjust dismissal' will be withdrawn and I agree to

waive any and all future claims that might arise as a result of my employment with your Ministry.

Yours truly,
[signed]
Robert H. Wilson

This resignation was accepted by the Ministry through the following communication dated January 15, 1976:

. . .

January 15, 1976

Dear Mr. Wilson:

Your request for acceptance of your resignation effective December 31, 1972 was received by this office January 14, 1976.

I am pleased to advise you that your resignation has been accepted by this Ministry under the conditions outlined in the second paragraph of your letter dated December 10, 1975.

As a result of your resignation, our records will be amended accordingly and outstanding payments in respect of your former employment will be processed immediately in the gross amount of \$3,814.11. This payment, of course, will have the statutory amounts such as income tax, Canada Pension, etc. deducted at source.

I am pleased this matter has been concluded to the satisfaction of both parties.

Yours sincerely,

[signed]

A.H. Glendenning, Director
Personnel Branch

cc: G. Bruce
Ontario Public Service Employees Union

A. POSITIONS OF THE PARTIES:

Mr. Wilson maintains that at the time he signed the above resignation, in 1975, he was mentally ill. - He argues that his mental illness was brought on gradually by agents of the Ministry, specifically, through what he describes as the "intolerable and harrassing" conditions under which he was required to work at the Peterborough Teachers' College and, subsequently, at the Toronto Teachers' College. Mr. Wilson argues that the Ministry viewed him as a threat to its concept of education and wanted to get rid of him. It is Mr. Wilson's position that the Ministry ignored medical reports assessing his mental condition and took advantage of his diminished mental capacity when it suspended him from the Peterborough Teachers' College in 1971, reinstated him at the Toronto Teachers' College in January of 1972, discharged him in December of 1972 and negotiated his resignation in 1975.

Mr. Wilson further maintains that in 1975, in collusion with the Union, the Ministry used coercive and threatening tactics, including bribery, to get Mr. Wilson to resign his employment and withdraw his grievance against the 1972 dismissal. In addition, Mr. Wilson claims that his agreement to resign was on the clear understanding that his teaching certificates (which had been suspended in 1972) would be reinstated. Because those certificates have not been reinstated despite repeated efforts on his part, he believes that he has been treated unfairly. He further complains that the Ministry refused to tell him what he needed to do to regain his certificates and alleges that he has been stonewalled.

Turning to his complaint against OPSEU, Mr. Wilson maintains that he was denied proper representation, in part, because the Union declined to consult legal counsel in assessing the merits of his 1972 discharge grievance. He claims that OPSEU further failed in its duty of fair representation because it neglected to have before it all the original medical reports pertaining to his mental capacity (instead of summaries of those reports) when it discussed his discharge grievance with the Ministry. To support his claim that inadequate attention was given to the medical records, Mr. Wilson points to the fact that in 1985 through a renewed application before the Public Service Pension Board (at which proceeding he was assisted by an OPSEU representative) he was awarded a pension based on medical records which concluded that the grievor was mentally ill at the time of his dispute with the Ministry over his discharge. He further argues that the documentary evidence before the Certificate Review Advisory Committee (which was struck in 1976 to review the suspension of his teaching certificates) supports the conclusion that Mr. Wilson was mentally ill at the time in issue.

Mr. Wilson asserts that if the Union had acted in accordance with its duty of fair representation it would have known in 1975 that Mr. Wilson was mentally ill and incapable of making a voluntary decision to sign a letter of resignation. He argues that the Union should have realized that it should have fought the discharge on grounds of mental illness instead of recommending that he resign from his employment.

In addition, Mr. Wilson complains that the Union did not adequately inform him about unemployment insurance, disability pensions or long term disability and that, as a result, his Canada Pension Plan has suffered greatly.

Counsel for the Ministry submits that the Tribunal has no jurisdiction over the Ministry in this matter. She argues that the complaint is essentially a complaint against the Union for an alleged breach of its duty of fair representation. She contends that Mr. Wilson's allegations against the Ministry do not fall under the purview of the Act and do not make out an alleged violation of the Act. In addition, counsel claims that the Tribunal should enforce the waiver Mr. Wilson signed as part of the resignation letter and, in accordance therewith, should dismiss any complaint against the Ministry. The resignation letter included a statement from Mr. Wilson that, "[u]pon acceptance of my resignation my current grievance against 'unjust dismissal' will be withdrawn and I agree to waive any and all future claims that might arise as a result of my employment with your Ministry". The Ministry argues that this proceeding is just such a "future claim".

In the alternative, and in respect of the merits of Mr. Wilson's allegations against the Ministry, counsel maintains that the Ministry conducted itself fairly and properly at all times. Counsel argues that the evidence plainly reveals that the reinstatement of Mr. Wilson's teaching certificates was never made part of the resignation package. Counsel maintains that the Ministry did not act contrary to the Act either when it

dismissed Mr. Wilson in 1972 or in 1975 when it accepted his resignation and withdrawal of grievance in exchange for a clear record of employment.

Counsel for the Union disputes that it breached its duty of fair representation in respect of Mr. Wilson. Counsel maintains that Mr. Grant Bruce, the OPSEU representative involved throughout the matter, carefully assessed the merits of Mr. Wilson's grievance against discharge and, on reasonable grounds, concluded that it was weak and in all likelihood would not succeed at arbitration. Counsel argues that the evidence establishes that when faced with what he considered to be a losing case at arbitration, Mr. Bruce's primary concern became Mr. Wilson's long range welfare: he wanted to lay a foundation for the reinstatement of Mr. Wilson's teaching certificates at some point in the future. Counsel submits that Mr. Bruce cannot be faulted for his advice that the best means of assisting Mr. Wilson regain his teaching certificates was for Mr. Wilson to clear his employment record by removing any reference to a dismissal. Counsel submits that the fact that Mr. Wilson's teaching certificates have never been reinstated does not negate the soundness of the approach taken by Mr. Bruce in 1975.

Counsel for OPSEU further argues that the evidence readily reveals that Mr. Wilson was not misled into believing that he would automatically regain his teaching certificates if he resigned. Counsel commented that it is difficult to accept the suggestion that Mr. Wilson was misled in this regard when it was clear in March of 1977 that he had failed in his efforts to regain his

certificates and equally clear that he did not complain about the quality of the Union's representation until March of 1985, some eight years later.

With respect to Mr. Wilson's claim that OPSEU should have known Mr. Wilson was mentally ill and incapable of freely entering into a signed agreement, counsel maintains that OPSEU does not have an obligation to be correct in its medical/psychiatric assessments of Mr. Wilson. Counsel submits that OPSEU fully reviewed the psychiatric data available to it and considered, on reasonable grounds, that Mr. Wilson was fit to work.

B. FACTS:

Mr. Wilson started his employment with the Ministry as a teacher at the Peterborough Teachers' College in or about 1960. The evidence reveals that up until 1970 there were few, if any, complaints about his work.

Circumstances changed for Mr. Wilson in 1970. Mr. Wilson felt he was being harrassed by officials and fellow staff in the school. He believed he was the subject of religious prejudice and that he was treated adversely for speaking the truth about education, as he saw it. Mr. Wilson became physically ill and claims that his mental illness was fostered by being required to work under such unpleasant circumstances.

In October of 1970 Mr. Wilson was suspended (indefinitely it would appear) for alleged conduct unbecoming a teacher. Mr. Wilson contacted the Union for assistance and Mr. Grant Bruce, a staff representative, filed a grievance against his suspension (or dismissal). It is undisputed that Mr. Bruce's representations to the Ministry on behalf of Mr. Wilson assisted him in gaining the right to return to work in January of 1972.

During the year following Mr. Wilson's suspension in October of 1970 and prior to his reinstatement in 1972, Mr. Wilson was examined by numerous doctors. Because much of Mr. Wilson's complaint involves the assertion that both the Ministry and Union should have known he was mentally ill and thus incapable of freely signing a letter of resignation in 1975, we have set out the significant correspondence on that issue that was placed in evidence before the Tribunal:

Macdonald Block
Parliament Buildings

May 4th, 1971

Confidential

Dr. E.E. Stewart
Deputy Minister
Department of Education
44 Eglinton Avenue West
Toronto, Ontario

Dear Dr. Stewart:

Re: Mr. Robert Wilson

Kindly refer to Dr. J.R. McCarthy's correspondence to this office dated April 15th, 1971 concerning the above-named Teaching Master at Peterborough Teachers' College.

This 42-year old man was interviewed and examined April 30th, 1971 on the order of his Department under Section 8a.(1) of the Regulations under The Public Service Act. Full details of interview and examination are on file in this office. It can be stated briefly that Mr. Wilson is suffering from an illness (which has resulted directly in discord with his colleagues) for which he requires energetic treatment.

In keeping with the recommendations of Mr. L.M. Johnston, Assistant Deputy Minister, April 7th, 1971, I would suggest that Mr. Wilson be advised that his suspension from duty will remain in force, that he should obtain treatment for his condition of ill health and that his case will be reviewed following completion of treatment.

There is the possibility that this man may not be able to resume his former duties. On the other hand, if he were to be dismissed from service without being given the opportunity for treatment this decision would probably be reversed by the Grievance Board in keeping with the recent decision involving a somewhat similar case in the Department of Transport.

The Employee Health Service will assist Mr. Wilson in arranging treatment if he accepts your Department's proposals.

Yours truly,

W.E. O'Hara, M.D.
Medical Director

[emphasis added]

...
August 9, 1971

Confidential

...

Dear Doctor Stewart:

Re: Mr. Robert H. Wilson

Kindly refer to previous correspondence concerning the above-named Teaching Master at Peterborough Teachers' College who was referred for compulsory medical examination under Section 8a.(1) of the Regulations under The Public Service Act.

In the interim since my letter of May 4th, 1971, Mr. Wilson has been assessed as an in-patient at the Clarke Institute of Psychiatry under Dr. B.W. Steiner and a report of August 4th, 1971 from the Clarke Institute is attached for your information.

In this report Dr. C.P. Nestor states that there is no reason why Mr. Wilson cannot continue with his teaching, but that it might be easier for him if he did not return to Peterborough. If Mr. Wilson were to remain in Toronto it would enable him to continue with on-going psychotherapy which has been recommended, and which apparently he has readily accepted.

If your Department agrees with Dr. Steiner's recommendations, it might be advisable to make Mr. Wilson's continued employment contingent upon his following the course of treatment arranged by Dr. Steiner. Please contact this Service if additional medical assistance is required for this employee.

Yours truly,

W.E. O'Hara, M.D.
Medical Director

[emphasis added]

September 10th, 1971

...

Dear Doctor Stewart:

Re: Mr. Robert Wilson

In response to your recent request, I interviewed Mr. Wilson again September 7th, 1971.

It is obvious that this man's condition of ill health is unchanged. This is unfortunately not surprising since the Clarke Institute has not been able to arrange suggested on-going psychotherapy with Dr. Peter Moore. In a telephone conversation with Dr. C.P. Nestor, September 8th, 1971, I was assured that an appointment would be made with Dr. Moore some time within the next two weeks.

While speaking to Dr. Nestor I discussed some points in her letter of August 4th, - particularly the statement that all tests performed while Mr. Wilson was in hospital revealed no abnormality. This is a misleading statement and Dr. Nestor confirmed that there were emotional problems linked to this man's personality and to his recent marriage break-up. She stated that she was optimistic regarding the ultimate outcome of continuing therapy.

In the meantime, Mr. Wilson's outlook towards his superiors and towards the field of teacher education remains unchanged. It would be foolhardy to suggest that he return to the classroom in his present condition. This would lead only to a resumption of the difficulties which your Department has previously encountered with this employee. If Mr. Wilson's services cannot be utilized by the Department in some other capacity, I can only suggest that he remain on sick leave of absence for a further period of time to permit observation of his progress in treatment under Dr. Moore.

Yours truly,

W.E. O'Hara, M.D.
Medical Director

[emphasis added]

...
October 26th, 1971

...
Dear Doctor Stewart:

Re: Mr. Robert Wilson

In answer to my letter of October 13th, 1971, Dr. Peter Moore replied October 21st, 1971 that Mr. Wilson has started on a programme of treatment with him, but that Dr. Moore is unable to make any statement regarding progress at the present time.

Dr. Moore has requested that I contact him at a later date and in keeping with your request of September 16th, 1971 I will endeavour to obtain a report by mid-December.

Yours truly,

W.E. O'Hara, M.D.
Medical Director

...
December 3rd, 1971

Confidential

...
Dear Doctor Stewart:

Re: Mr. Robert Wilson

Kindly refer to previous correspondence concerning the above-named Teaching Master of the Department of Education.

Mr. Wilson reported again for interview December 1st, 1971,
- the day following an appointment with Dr. Peter Moore

whom he has seen on four or five occasions. Dr. Moore had given Mr. Wilson an unsealed handwritten letter addressed to me.

In this letter Dr. Moore states, 'My continuing to see him (Mr. Wilson) is on the understanding that he comes for personal reasons, of his own choosing. There is no need, in my opinion, for him to require psychiatric consultations regarding his fitness to work. He is fit to work.' You will recall that in her letter of August 4th, 1971, Dr. C.P. Nestor of the Clarke Institute offered the same opinion.

During interview December 1st, 1971, I found Mr. Wilson unchanged from previous interviews with him on April 30th and September 10th, 1971.

This employee has no physical impairment of health. He has been assessed by two psychiatrists who have reported his ability to perform his teaching duties satisfactorily. Consequently, unsatisfactory performance or untoward behaviour cannot be attributed in this case to any impairment of physical or mental health.

Yours truly,

W.E. O'Hara, M.D.
Medical Director

[emphasis added]

By December 3, 1971, then, Mr. Wilson had been assessed by Dr. C.P. Nestor as an in-patient at the Clarke Institute of Psychiatry and, at the Institute's suggestion, had received ongoing psychotherapy under psychiatrist Peter Moore. Both Dr. Nestor and Dr. Moore concluded that Mr. Wilson was fit to work. Moreover, although Dr. W.E. O'Hara, M.D., stated in his letter of September 10, 1971 that "it would be foolhardy to suggest that [Mr. Wilson] return to the classroom in his present condition", by the time of his letter dated December 3, 1971 (which followed a more recent interview with Mr. Wilson and some four or five appointments between Mr. Wilson and Dr. Moore),

Dr. O'Hara had revised his assessment. He stated, "[c]onsequently, [given the reports of the two psychiatrists] unsatisfactory performance or untoward behaviour cannot be attributed in this case to any impairment of physical or mental health".

Consistent with the medical assessment of two psychiatrists that Mr. Wilson was fit to work, Mr. Wilson was notified by the Deputy Minister of Education, Dr. E.E. Stewart, that he was being reinstated to his teaching position, on terms, at the Toronto Teachers' College. The reinstatement letter dated January 20, 1972 provides as follows:

January 20, 1972

. . .

Dear Mr. Wilson:

The Chairman of the Review Board who conducted your hearings on April 7, 1971, has reported to me and, on the basis of this report, **I have ruled that your appeal against dismissal be sustained. I have accepted, however, the following recommendations** submitted by the Chairman in respect of your continuing employment:

1. That the charges against you remain part of your active file.
2. That you be assigned to a Master position at a teachers' college other than Peterborough.
3. That such assignment be made probationary and include clearly stated standards of performance.
4. That your performance be reviewed periodically by the college Principal concerned and officials of the Teacher Education Branch.

To implement these recommendations, you will report for duty at the Toronto Teachers' College on February 1, 1972. When staffing needs for 1972-73 have been determined, you may be assigned to the Toronto Teachers' College staff or transferred to another college.

In your new assignment, you will be on probation and your performance will be reviewed periodically by the Principal and officials of the Teacher Education Branch. You will be expected to:

- a) carry out duties delegated by the Principal of the Toronto Teachers' College, including satisfactory implementation of the course or courses assigned to you;
- b) maintain a cooperative attitude in your dealings with your Principal and fellow members of staff;
- c) carry out your duties in a manner which will avoid disbarment from practice schools, as was the case in Peterborough;
- d) refrain from encouraging dissension and from the use of sarcasm, vulgarity and abusive language in your oral and written communication with students, principal, and staff.

A confidential copy of this letter will be forwarded to Mr. J.D.Stennett, Principal, Toronto Teachers' College, and you are to contact Mr. Stennett with respect to your duties. As there is no regular staff vacancy at the Toronto College your professional duties may be varied in nature.

Yours sincerely,

E.E. Stewart
Deputy Minister of Education

[emphasis added]

Pausing at this point in the series of events, the Tribunal observes that in respect of the suspension of Mr. Wilson in October of 1970, Mr. Wilson was well represented by the Union. Indeed, Mr. Wilson makes no suggestion to

the contrary, although he felt that Mr. Bruce was overburdened with work. We would further conclude at this point that based on the medical reports submitted to the Ministry as of December of 1971 neither Mr. Bruce nor the Ministry had any reasonable grounds for doubting the veracity of the summaries of the medical reports as set forth in letters from Dr. O'Hara. Accordingly, given the content of the reports, they had every reason to believe that Mr. Wilson was mentally fit to work.

We turn now to the events leading directly to the instant complaint before the Tribunal. Mr. Wilson reported for work at the Toronto Teachers' College on or about February 1, 1972. Mr. Wilson complained that his reputation had preceded him to the Toronto Teachers' College and that working conditions there were just as bad as at Peterborough. Shortly thereafter, some time in March of 1972, Mr. Wilson, along with a student, became involved in a drug incident at the U.S.A./Canada border. Mr. Wilson was charged with criminal offences involving the attempted smuggling of cocaine from Canada into the United States. He was detained in Buffalo, New York for several months and, apparently, underwent some form of psychiatric assessment there. He pleaded guilty to the charges and was ultimately tried, convicted and sentenced in both the U.S.A. and Canada.

By a letter dated March 27, 1972 Mr. Wilson was advised by the Deputy Minister of Education that in view of the incident at the Canada/U.S.A. border he was being placed under suspension, without pay, pending the results of an investigation. The letter of suspension states the following:

March 27th, 1972

Dear Mr. Wilson:

You will recall in my letter of January 20, 1972 I listed the conditions under which the Department would continue your employment. You were expected to:

[conditions omitted - set out above]

It has now come to my attention that an incident recently occurred in Niagara Falls at the Canada/U.S. border and I understand that charges have been laid against you.

You should understand that I have asked for an investigation of all outstanding circumstances. You should further understand that pursuant to section 22(1) of the Public Service Act, I have suspended you from the Department of Education's employment without pay effective today pending the results of this investigation.

We will communicate with you further at the earliest possible time.

Yours sincerely,

E.E. Stewart
Deputy Minister of Education

On July 17, 1972 Mr. Wilson was notified by the Ministry that his teaching certificates had been suspended in light of the criminal charge against him, a charge to which he had pleaded guilty. It is Mr. Wilson's inability to regain these certificates that has fueled much of the instant complaint. The letter from the Ministry withdrawing Mr. Wilson's teaching certificates provides as follows:

July 17, 1972

REGISTERED MAIL

...

Dear Mr. Wilson:

You are hereby advised that because of the criminal charge against you, to which you pleaded guilty, your Permanent Elementary School Teacher's Certificate, Standard 4, Number 81706, Elementary Industrial Arts and Crafts, Type B, Certificate No. 39715, and Education Certificate, No. 4164, and any other teaching certificates that have been issued to you are suspended.

You are asked to forward these certificates to the Teacher Education and Certification Branch, 17th Floor, Mowat Block, Queen's Park, Toronto 182.

Yours truly,

A.W. Bishop,
Registrar

Following his trial and conviction in the United States, Mr. Wilson, on November 14, 1972, received a two-year suspended sentence. He was placed on probation to the United States courts for four years, on condition that he not return to the United States. Parenthetically, it may be noted that some two years later, on October 9, 1974, Mr. Wilson pleaded guilty in Canada to the charge of possession of a narcotic and was put on probation for one year.

Returning to the sequence of events, on or about December 15, 1972 the Ministry reviewed Mr. Wilson's suspension and concluded that he should be

dismissed. It is the grievance against this discharge that Mr. Wilson withdrew when he signed his letter of resignation in 1975. The discharge letter provides as follows:

REGISTERED MAIL

December 21, 1972

. . .

Dear Mr. Wilson:

Further to my letter to you dated December 8, 1972 and the hearing of December 15, 1972 at which you were present, I now have the report and recommendations of the Chairman of the hearing.

The findings of this hearing concluded 'that the decision to dismiss was not the result of a single incident but of a cumulative series of events which demonstrates to the apparent satisfaction of management that Mr. Wilson was, or had become, unsuitable for the position to which he had been appointed'.

After considering all the circumstances of your case and representations made on your behalf at the hearing, I have determined that you have failed to conduct yourself in a manner suitable for an employee of this Ministry in that your actions are prejudicial to the effectiveness of this Ministry, nor in the best interests of discharging its public responsibilities. You have further given cause to have your teaching certificates suspended, thus you no longer possess the qualifications of a teacher.

I have determined that you have conducted yourself in a manner detrimental to the requirements and duties of your position. I, therefore, in consideration of all of the circumstances and in accordance with Section 21(3) of The Public Service Act, dismiss you from employment with the Ministry of Education.

I should advise you that the dismissal is effective upon receipt of this notification. However, you have the right, if you believe you are being dismissed unjustly, to apply within

twenty-one days of receipt of this notice to the Public Service Grievance Board for a hearing.

Yours sincerely,

E.E. Stewart
Deputy Minister of Education

[emphasis added]

Between the date of his discharge in December of 1972 and the point of his resignation in 1975, as well as beyond, Mr. Wilson made numerous, albeit fruitless, efforts to regain his teaching certificates. Those efforts may be summarized as follows:

- a) On January 4, 1973 Mr. Wilson wrote to the Deputy Minister of Education, Dr. E.E. Stewart, requesting that his certificates be reinstated. On January 24, 1973 Dr. E.E. Stewart refused the request through the following letter which provides, in part, as follows:

The Minister and I have reviewed this matter and it has been determined that there is no evidence available to us in your letter, or from other sources, that would justify a reinstatement of your certificates at this time. The certificates were suspended because your conduct, as reflected in your conviction on a serious criminal offence, was deemed to be inconsistent with that expected of a person certified to teach in the Province of Ontario.

While it is true that teaching certificates are reinstated from time to time, it is always on the basis of evidence that the individual concerned has re-established himself in terms of those circum -

stances which led to the initial suspension. I would suggest, therefore, that if and when there is evidence to this effect in your case, you apply for a further review of the status of your certificates.

[emphasis added]

Contrary to Mr. Wilson's submissions against the Ministry, the Tribunal is satisfied that this letter does provide Mr. Wilson with guidance on what he would need to do to regain his teaching certificates. He was advised to provide "evidence that [he] has re-established himself in terms of those circumstances which led to the initial suspension".

b) On January 29, 1973 Mr. Wilson wrote to the Minister of Education, Mr. Thomas L. Wells, complaining about various aspects of the treatment he had been receiving at the hands of the Ministry. On February 6, 1973 the Minister replied with the following letter:

Dear Mr. Wilson:

This will acknowledge your letter to me of [29] January, 1973, in which you raise a number of questions in regard to the status of your teaching certificates.

First, may I say that I have discussed with Dr. E.E. Stewart, the Deputy Minister of Education, his recent conversation with you about this matter. He has expressed surprise in regard to the attitude that you seem to have adopted about your telephone exchange and he can only suggest that his efforts to be forthright with you were misunderstood, given your sensitivities about the current status of your certificates and the actions taken in regard to your

employment within the Ministry of Education. He made the further observation that, in his opinion, taking quotations out of context from what was a fairly lengthy conversation hardly contributes to a full understanding of your existing situation.

Now let me turn to the question of the suspension itself. That action was taken, as you are aware, following receipt of evidence of your conviction in the United States of a serious criminal offence involving the attempted smuggling of a large quantity of prohibited drugs into that country. There is little question, in my opinion, that your involvement in such an illegal undertaking hardly exemplifies the conduct and the character that one would judge acceptable for a person who wishes to teach the young people of this Province. Indeed, it is even more disappointing in your instance because one would expect an even higher standard of conduct of one who was involved as a teacher of teachers.

In an attempt to give proper consideration to your case, however, we decided to follow the same pattern of review that would be used in the case of any Ontario teacher whose worthiness to hold an Ontario certificate had been called into question. That is why your case was referred to the Ontario Teachers' Federation, a procedure that was explained to you by both letter and telephone by Mr. William VanderBurgh of our Supervisory Services Branch on 3 January, 1973. It also resulted in a delay in Dr. Stewart's more formal response to your letter of 10 December. When the Federation decided that, because you were not currently a member of that organization, it did not wish to offer an opinion on the status of your certificates, I reviewed the situation personally, giving full attention to the various documents that had been made available to the Ministry as a result of the court action in the United States. On the basis of that evidence I reconfirmed the original order for suspension.

Your attitude towards the suspension, as reflected in recent correspondence and your several telephone conversations with officials of the Ministry, leaves me with the impression that you may underestimate the seriousness of your own actions and of the decision that has been taken in

regard to your status as a teacher in this Province. Frankly, given the nature of the offence of which you were convicted, I feel that insufficient time has passed to make a judgment as to whether your certificate should be reinstated. I note, for example, that the United States court decided that you would be subject to a two year suspended sentence and placed on probation for a four year period.

Finally, let me comment on the issue of double jeopardy which you have apparently raised in other quarters. As you can imagine, this issue has been raised a number of times in regard to the consideration of the professional status of teachers who have been convicted in the courts. As a result, our officials and legal officers have given a good deal of attention to this issue. It is clear from this thorough review that arguments of double jeopardy are not valid in situations of this kind since decisions in regard to one's right to continue as a member of the profession must clearly be related to the standards expected of a member of that profession. Judgments about such status must be made quite apart from any general legal actions that may have taken place.

I trust that this will clarify my position and explain my actions in regard to the suspension of your teaching certificates.

Cordially,

Thomas L. Wells,
Minister.

c) On February 13, 1973 Mr. Wilson again directed correspondence to the Minister which brought forth a reply on February 22, 1973, a reply which has apparently been the cause of some misunderstanding. The letter clearly states that **at the very minimum** Mr. Wilson's certificates would remain under suspension while he was on probation to the United States courts. It does not undertake that

his certificates would be returned when his probation was over. The February 22, 1973 letter reads as follows:

22 February, 1973

Dear Mr. Wilson:

This will acknowledge your letter of 12 February, 1983, in which you comment further on the recent suspension of your teaching certificates.

I can only reiterate, at this time, the observation which I set out in my letter to you of 6 February, 1973, in which I suggested that you seemed to underestimate the serious nature of the actions that led to the suspension of your certificate and of the suspension itself. The suspension stands and will continue at least as long as you continue on probation to the United States courts. When that probationary period is complete, I shall be pleased to review your situation and make a further determination in regard to the status of your teaching certificates.

Cordially,

Thomas L. Wells,
Minister.

[emphasis added]

d) On November 19, 1974 Mr. Wilson again wrote to the Minister requesting a reinstatement of his certificates. On December 2, 1974 the Minister replied that there had been no change in status.

e) By a further letter to the Minister on December 18, 1974 Mr. Wilson emphasized that his period of probation in the United States

had been terminated on February 8, 1974, approximately two years ahead of schedule. By a letter dated January 6, 1975, however, the Minister replied that he could still not reinstate his certificates. Mr. Wilson engaged the services of a lawyer, Mr. P.M. Champagne, who on May 30, 1975 wrote to the Minister requesting a review of the decision to suspend Mr. Wilson's teaching certificates.

f) Mr. Wilson's resignation from employment was effected in December of 1975. The next month, in January of 1976, Mr. Wilson renewed his request for the reinstatement of his certificates. On January 20, 1976 his request was refused.

g) Mr. Wilson contacted the office of the Ontario Ombudsman. As a result, the Minister of Education struck a Certificate Review Advisory Committee (C.R.A.C.) to hear the application of Mr. Wilson for the reinstatement of his certificates. A hearing of the C.R.A.C. took place on October 7, 1976, well after the signing of Mr. Wilson's resignation in December of 1975.

The C.R.A.C. wrote an extensive report dated March 1, 1977 supporting its unanimous recommendation that no action be taken regarding Mr. Wilson's teaching certificates, i.e. that they remain under suspension.

The C.R.A.C. refers to psychiatric interviews Mr. Wilson had with a Dr. Miller in the United States. This is the only evidence before the Tribunal regarding Dr. Miller's assessment of Mr. Wilson. We have not been made aware through evidence of precisely when or under what circumstances Mr. Wilson saw Dr. Miller. It may be, though, that that happened when he was detained in Buffalo in 1972. In documents put before the C.R.A.C., though not before this Tribunal, Dr. Miller wrote of Mr. Wilson, "It is my conclusion that [Mr. Wilson] is a seriously mentally-ill man. His illness has made it impossible for him to appreciate the nature and consequences of his acts over the last three or four years". Dr. Miller is further recorded as stating,

To place [Wilson] in perspective...all the events referred to...indicated a gradual deterioration in his capacity to deal with himself and the rest of his life. More and more over the last decade he has made self-defeating decisions, and at times these decisions have even encroached into areas of illegality. The patient, however, does not seem to respond to this concern, of his family or those about him. It appears to me that his judgment has slowly but steadily slipped during the past ten years and that the full impact of his emotional illness only became apparent over the last two or three years.

If Mr. Wilson did see Dr. Miller in 1972 while he was detained in Buffalo, Dr. Miller's assessment would appear to be in some conflict with that of Dr. Nestor and Dr. Moore, the two psychiatrists referred to in the letters to the Ministry from Dr. W.E. O'Hara.

The C.R.A.C. report indicates that when Mr. Wilson spoke to the C.R.A.C. about his interviews with Dr. Miller he said, "That was laid on thick....Laid on thick for the purpose of the government". The transcript of the proceeding before the C.R.A.C. further indicates that Mr. Wilson said he had later contact with another psychiatrist, (a Dr. Abbott), "because it was recommended to look good for the Canadian charge". Dr. Miller's report was not made available to the Tribunal. Moreover, Mr. Bruce stated that he could not recall seeing it when he negotiated Mr. Wilson's resignation in 1975. Before the Tribunal the Ministry produced the medical reports that were in its file, as set out above, and Dr. Miller's report was not among them. Mr. Wilson did not produce a report from Dr. Miller; nor did he provide any details of his visits with him.

The C.R.A.C. stated in its report that the manner in which Mr. Wilson presented himself to the Committee was "less than satisfactory". Without reviewing the details of its concerns regarding Mr. Wilson, we would simply note the Committee's conclusion at pages 20-21 of its report:

[The Committee] respects the need to be assured of the personal stability and professional competence of the applicant; it has seen a hostile, apparently unrealistic applicant who seems to feel power in profanity and who appears alternately antagonistic and apathetic in his reactions to the Committee as well as to others.

The Committee feels that the lack of sufficient positive information in this case combined with the question of credibility which the applicant presents by virtue of his testimony and the apparent disregard of facts he does not wish to acknowledge, has resulted in what can be considered substantial if not overwhelming doubt on its part, with respect to reinstatement [of his teaching certificates].

Consequently, having given careful consideration to all factors and having studied all the evidence made available to it, the Committee is of the [unanimous] opinion that there is not sufficient positive evidence, on balance, to justify a recommendation for reinstatement.

On March 28, 1977 the Minister advised Mr. Wilson that based on the findings and recommendations of the C.R.A.C. he had decided not to reinstate Mr. Wilson's teaching certificates.

We turn now to the Union's relationship with Mr. Wilson between his 1972 dismissal and his resignation in 1975. Mr. Bruce became involved with Mr. Wilson once again in March of 1972, two months after he was reinstated to the Toronto Teachers' College. He was contacted for help when Mr. Wilson was detained in Buffalo as a result of the border/drug incident. When Mr. Wilson's suspension pending investigation was turned into a dismissal after his conviction on the drug charges, Mr. Bruce assisted Mr. Wilson file a grievance against the discharge.

Mr. Bruce testified to the circumstances of his recommendation in 1975 that Mr. Wilson resign from his employment rather than pursue his discharge grievance. He stated that when Mr. Wilson lost his teaching

certificates and then lost in his appeals to the Minister to get them reinstated, he became increasingly pessimistic about the likelihood of being able to overturn the discharge at arbitration. Mr. Bruce felt that the combination of Mr. Wilson's previous suspension from the Peterborough Teachers' College, his criminal charge/conviction/sentence together with his loss of teaching certificates were serious hurdles in the discharge grievance which, in all likelihood, could not be overcome. Mr. Bruce testified that he felt that in these circumstances Mr. Wilson's best interests would be served by taking those steps that would assist Mr. Wilson the most in an effort to regain his teaching certificates down the road. In that regard he considered that Mr. Wilson would benefit considerably more from resigning and having a clear employment record than he would from having on his record a discharge upheld at arbitration.

Mr. Bruce further testified that he considered the psychiatric reports available to him which may have included something from the United States, although not Dr. Miller's assessment. As noted Mr. Bruce does not specifically recall reviewing or being advised of the existence of a report from Dr. Miller. Mr. Bruce concluded from the reports he saw that they were not of sufficient strength to advance an argument against discharge on the grounds of mental illness.

Mr. Bruce further considered the possibility of Mr. Wilson obtaining a medical disability pension based on his psychiatric diagnosis. Mr. Bruce testified without contradiction, however, that to qualify for such a pension

under the legislation that existed at that time, one first had to be terminated from employment. Mr. Bruce thought that in obtaining such benefits a termination by way of resignation would serve him better than a termination through discharge. -

Mr. Bruce also advised Mr. Wilson that if he resigned he would receive more money by way of severance pay than he would if he were terminated for cause. The Tribunal finds no basis for considering that Mr. Bruce's statement regarding severance pay was anything other than a statement of fact - something to be considered in the balance. We cannot endorse Mr. Wilson's opinion that it was a bribe.

After discussing the merits of the situation with Mr. Wilson, Mr. Bruce approached the Ministry on Mr. Wilson's behalf to determine whether the Ministry would consider a resignation in lieu of discharge for cause.

The evidence satisfies the Tribunal that to effect the resignation Mr. Bruce discussed the merits of Mr. Wilson's grievance with Mr. Wilson, with other representatives in the Union and with the Ministry. Mr. Bruce stated that he did not think it was necessary to consult a lawyer. With respect to the content of the resignation agreement, the Tribunal is persuaded by the evidence of both Mr. Bruce and Mr. Andrew Glendenning (who negotiated the agreement on behalf of the Ministry) that the reinstatement of Mr. Wilson's certificates was not a condition of the resignation. As Mr. Glendenning testified, a teacher's employment and his or her teaching certificates are two

distinct matters handled by two different areas of the Ministry. The negotiators of the resignation did not have the authority to reinstate Mr. Wilson's teaching certificates.

Mr. Bruce testified that he believed that Mr. Wilson fully understood and appreciated the consequences of his resignation. He commented that if Mr. Wilson was mentally ill at the time of the resignation and incapable of formulating an intention to resign or unable to appreciate the nature and consequences of that act, he did not know it. Similarly, Mr. Glendenning testified that the medical reports he saw in the course of negotiating the resignation stated that Mr. Wilson was fit to work. Like Mr. Bruce, Mr. Glendenning does not recall seeing or being advised of the comment from Dr. Miller which is quoted in the 1977 C.R.A.C. report and set out above.

Not long after the resignation Mr. Wilson applied to the Public Service Superannuation Fund Board for a medical disability pension. According to Mr. Bruce the legislation at that time stipulated total disability as a necessary qualification. Mr. Wilson's application was turned down because he was not found to be totally disabled.

In 1984, close to a decade after his resignation, Mr. Wilson, with help from an OPSEU representative, renewed his request for a disability pension before a new Public Service Superannuation Board (PSSB). Mr. Bruce was not the one involved in this application because he was no longer an OPSEU grievance officer. Mr. Bruce stated that he was happy for Mr. Wilson when he

learned that the PSSB had awarded him a disability pension benefit dating back to approximately 1972 but equally surprised at the result. He stated without contradiction that, to the best of his knowledge, the medical documentation before the PSSB consisted of a medical report from only one psychiatrist and did not include two-thirds of the medical information that was also available in 1972 such as the reports from the Clarke Institute or Dr. Moore which indicated that Mr. Wilson was fit to work. Mr. Bruce did not hesitate to acknowledge that he believed the result in 1985 might have been different if all the medical documentation had been placed before the PSSB.

Mr. Bruce stated his belief that the instant complaint before the Tribunal results directly from Mr. Wilson's assumption that since he was awarded the medical disability pension in 1985 retroactive to 1972, he must have been misrepresented by the Union between 1972 and the point of his resignation in 1975.

C. DECISION:

The duty of fair representation imposed on unions by section 30 of the C.E.C.B.A. is well set out in the following excerpt from Sack and Mitchell, Ontario Labour Relations Board Law and Practice (Butterworths, Toronto, 1985). Section 68 of the Ontario Labour Relations Act discussed by Sack and Mitchell is virtually the same as section 30 of the C.E.C.B.A. and imposes upon

unions a similar duty of fair representation. At pages 473-486 Sack and Mitchell summarize the duty of fair representation as follows:

8:6000 DUTY OF FAIR REPRESENTATION

8:6100 Scope. Section 68, enacted in 1970, imposes upon unions a duty not to act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the bargaining unit. By providing that the trade union, as the exclusive bargaining agent, has a duty to consider all the interests that it represents, the section is designed to ensure that individual or minority rights are not abused. However, a union is not required by s.68 to become the guarantor or insurer against every adversity suffered by an individual employee. Rather, it is required only to fairly consider and weigh the competing interests of all employees in the unit represented by it. The duty of fair representation applies both to the processing of grievances and to the conduct of negotiations, although the Board will not lightly interfere with the very wide discretion granted to the bargaining agent in negotiating in the best interests of the employees...

. . .

8:6300 Procedure and onus of proof.

. . .

The onus of proof on the complainant is to establish on a balance of probabilities that the trade union acted in a manner that was arbitrary, discriminatory or in bad faith and, where the Board cannot determine whose evidence to prefer, the complainant will fail. ...

8:6400 Standards of fair representation.

. . .

In determining whether there has been a breach of s.68 the Board recognizes that union affairs are conducted in some cases by laypersons and in others by experienced trade union officials. The standards applied by the Board are fashioned according to what is appropriate in each given situation. In

evaluating the conduct of the union, the Board refers to the norms of the industrial community and the measures and solutions that have gained acceptance within that community....

. . .

8:6410 Arbitrariness defined. Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to obtain the data to justify a decision; it has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent and summary, or capricious and non-caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. As the Board said in ITE Industries:

...In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

The Board has said, however, that there comes a point when mere negligence becomes gross negligence which may be viewed as arbitrary when it reflects a complete disregard for critical consequences. At the same time, the Board has always recognized that a union's affairs are normally conducted by laypersons who are elected and who may not have a great deal of formal education or training.

. . .

The union has been found to be in breach of its duty where it acted without evidence or did not seek evidence, or acted on the basis of rumour and unfounded suspicion, or on the basis of irrelevant factors, or with utter neglect displaying an indifferent and summary attitude, or with gross negligence in that it wilfully misled an employee or recklessly disregarded whether the employee was in fact misled, or capriciously with a non-caring attitude, or in a way that was almost perverse....

. . .

8:6420 Bad faith defined. Bad faith in the context of processing grievances has been described as acting on the basis of hostility or ill-will, dealing dishonestly with the grievor in an attempt to deceive, or refusing to process the grievance for sinister purposes. A knowing misrepresentation constitutes bad faith, as does concealing matters from the complainant. A union was found to have acted in bad faith when it protected relatives of senior union officials to the detriment of the complainants, and where a union official acted with overt hostility towards a grievor by withholding vital information and making physical threats.

8:6430 Discrimination defined. The Board has held that the term 'discriminatory' is not limited to cases of racial discrimination but will be given a broad interpretation to include all cases where the union distinguishes among its members without cogent reasons. As the Board said in The Municipality of Metropolitan Toronto:

The prohibition against a union acting in a manner that is discriminatory functions to prevent a union from distinguishing among members in the bargaining unit unless there are good reasons for doing so. To avoid acting in a manner that is discriminatory, the duty requires, in general, that like situations be treated in a like manner and that neither particular favour nor disfavour befall any individual apart from the others unless justified by circumstances. The duty does not make the union guarantor for every aggrieved employee. Instead, the duty requires that the union consider the position of all of its members and that it weigh the competing interests of minorities or individuals in arriving at its decisions.

. . .

8:6440 Processing and settlement of grievances. The processing and settlement of grievances has given rise to the majority of complaints which have been brought under s.68. A trade union is not required to file a grievance in every case or to blindly carry every grievance through to arbitration at the demand of an aggrieved employee; furthermore, the right of a union to settle grievances, even if meritorious, is in no way curtailed by s.68 provided that in the course of doing so, the trade union does not act in a way that is arbitrary, discriminatory or in bad faith. ...

. . .

[Summary]:

The Board will not interfere if the trade union merely made a mistake; did not take the wisest course; was merely negligent or took a course that the Board would not have taken, or took inadequate steps, provided that the union does not act in a manner that is arbitrary, discriminatory or in bad faith. In short, the Board is reluctant to 'second guess' the decisions of the trade union or to impose unrealistic standards of conduct on union officials. On the other hand, the prohibition against arbitrary conduct means that not all mistakes or careless conduct are outside the scope of s.68. As the Board explained in *ITE Industries Ltd.*, flagrant errors in the processing of grievances which are consistent with a non-caring attitude will be held to be arbitrary within the scope of s.68, but not honest mistakes or even negligence. There does, however, come a point when 'mere negligence' becomes 'gross negligence', which may amount to arbitrary conduct when it reflects a complete disregard for critical consequences to the employee.

The refusal of a union to allow the grievor to have his own counsel present the case at arbitration has been held to have been properly based on the practice between the parties and the potentially detrimental effect on the relationship if the grievor's own counsel were to appear. Where a union sought a legal opinion as to the merits of proceeding to arbitration and, on the basis of that advice, determined not to pursue the matter, it was held to have acted fairly. However, the Board has suggested that a consistent policy of not filing grievances in certain circumstances, in disregard of the provisions of a collective agreement, might be considered arbitrary.

[emphasis added]

The Tribunal has carefully reviewed all of the evidence and submissions presented by the parties. We conclude without hesitation that the Union abided by its duty of fair representation in the manner in which it dealt with Mr. Wilson following his discharge in December of 1972 and, indeed, at all other points covered in the evidence.

Section 30 of the CECBA requires that a union not act in a manner that is arbitrary, discriminatory or in bad faith in its representation of employees. Taking these standards in reverse order we find that neither Mr. Bruce nor anyone else in the Union ever treated Mr. Wilson with hostility, ill-will or deceit, attitudes which if present would constitute bad faith. The Tribunal is fully satisfied that the Union at all times approached Mr. Wilson with respect and was motivated by a concern for his well-being and best interests. The Union did not try to bribe him into resigning or coax him into signing the resignation to simply get rid of him. Mr. Bruce presented the options to Mr. Wilson as he honestly and reasonably saw them and invited Mr. Wilson to make what Mr. Bruce thought was a voluntary decision to resign.

The Tribunal must further find that there is no evidence to suggest that the Union discriminated against Mr. Wilson by reason of his alleged mental incapacity or, indeed, on any other account. Mr. Bruce was guided by at least two doctors' reports which concluded that Mr. Wilson was fit to work. If Mr. Wilson was mentally incapacitated at the time in question, (between 1972 and the point when he signed the letter of resignation in 1975), Mr. Bruce did not know it. The Tribunal has before it no evidence to cause it to conclude that the Union dealt with Mr. Wilson any differently than it would have dealt with any other individual in similar circumstances. He was accorded neither particular favour nor disfavour.

We turn then to the standard of arbitrariness. Did the Union act in an arbitrary manner in presenting Mr. Wilson with the resignation letter to sign

in exchange for his withdrawal of the grievance and release from further claims? The Tribunal is fully satisfied that Mr. Bruce directed his mind to the merits of Mr. Wilson's discharge grievance. It was that very act and his conclusion that Mr. Wilson had a weak case for arbitration that caused him to present Mr. Wilson with the alternative of resignation instead of proceeding to arbitration with his discharge grievance. The Tribunal is well satisfied that Mr. Bruce did not act on irrelevant considerations; nor did he display a non-caring attitude. He did not make flagrant errors or draw implausible conclusions. He kept Mr. Wilson well advised and informed him of all his options as he saw them. Given the standards of the industry and the extent of consulting Mr. Bruce did with other Union officials over the merits of Mr. Wilson's grievance, we cannot conclude that Mr. Bruce's failure to consult legal counsel constitutes, in any way, a breach of the Union's duty of fair representation. Any shortfalls which one might find in retrospect or the existence of any areas in which a trained lawyer might have done a better job are not matters which come close to arbitrariness and do not constitute a breach of the Union's duty of fair representation.

Mr. Wilson argues that Mr. Bruce should have known he was mentally ill at the time, should have fought the discharge on that ground and should have realized he was incompetent to sign a resignation letter. Even if there is medical evidence available today (though no such cogent evidence was presented to the Tribunal in the instant hearing) to establish that Mr. Wilson was mentally ill at the relevant time and incapable of appreciating the ramifications of signing the resignation letter, the Tribunal cannot conclude

on the evidence that Mr. Bruce, at the time in question, acted arbitrarily in proceeding the way he did. Mr. Bruce reviewed the medical records available to him. These records, including the ones written a few months prior to the discharge, supported the conclusion that Mr. Wilson was fit to work. Mr. Wilson claims that Mr. Bruce should have asked for the original psychiatric reports rather than relying on summaries provided by other doctors. Mr. Bruce cannot be faulted for accepting the assessments/interpretations/summaries of qualified psychiatrists and medical doctors. He is not a doctor and would give cause for concern if he did not rely on the opinions of qualified doctors. Moreover, there is nothing in the evidence to suggest that Mr. Bruce had any cause to suspect that the summaries were either incomplete or not valid.

We conclude then that Mr. Bruce did not act with a reckless disregard or a careless attitude in failing to seek more medical evidence before negotiating the resignation. Mr. Bruce did not ignore advice from Mr. Wilson about the existence of additional available psychiatric assessments which might have supported a conclusion of mental incapacity. Mr. Bruce acted on the available evidence and, we conclude, did not act in an arbitrary manner in failing to carry out further investigations.

Turning to the Employer, the Tribunal further finds that Mr. Wilson has failed to establish that the Employer acted in breach of the Act. The Tribunal cannot conclude that the Employer acted contrary to its obligations under section 29 of the Act in either discharging Mr. Wilson, negotiating and

accepting his resignation, or in any other aspect of this matter. Mr. Wilson has not established that the Ministry suppressed relevant medical evidence in its dealings with Mr. Wilson. In addition, we are satisfied that the Ministry did not bribe Mr. Wilson into offering his resignation and withdrawing his grievance. Nor did the Ministry discriminate against him because he was mentally ill or seek, on that ground, to deter him from pursuing his grievance or exercising his rights under the Act. Moreover, the Ministry did not promise the return of his teaching certificates if he resigned. The Tribunal is satisfied that the Ministry acted out of legitimate considerations respecting its own responsibilities. While it discharged Mr. Wilson, accepted his resignation and refused to reinstate his teaching certificates, we cannot conclude that the Ministry acted in violation of any section of the Act.

In summary, then, for the reasons set out above, the Tribunal concludes, first, that the Union acted in accordance with its duty of fair representation in its handling of all matters affecting Mr. Wilson and, second, that the Ministry did not act in breach of its obligations under the Act in the manner in which it dealt with Mr. Wilson.

Accordingly, Mr. Wilson's complaints against the Union and the Ministry are hereby dismissed.

DATED at Toronto this 22nd day of May, 1987.

A handwritten signature in dark ink, appearing to read 'P. Picher', is written over a horizontal line.

PAMELA C. PICHER
Chairperson
For the Tribunal



Ontario Public Service
Labour
Relations
Tribunal

Fonction Publique de l'Ontario
Tribunal Administratif
des Relations
du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/596-0686

T/78/84

B E T W E E N :

Canadian Union of Public Employees
Local 1750

Applicant

- and -

The Crown in Right of Ontario
(The Workers' Compensation Board)

Respondent

B E F O R E :

Owen B. Shime, Q.C., Chairman
E.C. Witthames and
J.H. McGivney, Q.C., Tribunal
Members

A P P E A R A N C E S :

Mr. R. A. Carnovale, and others, for
the Applicant

Ms. B. J. Bowlby, and others,
for the Respondent

H E A R I N G :


June 6, 1985

-

This is an application under Section 40(1)
of the Crown Employees Collective Bargaining Act to determine
whether Ms. Donna P. Whitmore, who is an Office Systems Specialist
at the Workers' Compensation Board, is an employee within the
meaning of the Act.

Having regard to the evidence and the submissions
of the parties and, for the reasons given orally at the hearing, the
Tribunal determines that Ms. Donna P. Whitmore is an employee
within the meaning of the Act.

DATED at the City of Toronto this Fourteenth day of June, 1985.



Owen B. Shime, Q.C.
For the Tribunal



Ontario Public Service
Labour

Fonction Publique de l'Ontario
Tribunal Administratif



Ontario Public Service

Labour
Relations
Tribunal

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416/598-0

T/81/84

B E T W E E N :

- Canadian Union of Public Employees
Local 1750

Applicant

- and -

The Crown in Right of Ontario
(The Workers' Compensation Board)

Respondent

B E F O R E :

O. B. Shime, Q.C., Chairman
E. C. Witthames and
J. H. McGivney, Q.C., Tribunal
Members

A P P E A R A N C E S: Mr. G. Jones, and others, for the
applicant

Ms. B. J. Bowlby, and others, for the
respondent

H E A R I N G:

June 6, 1985

This is an application under Section 40(1) of the Crown Employees Collective Bargaining Act to determine whether Ms. K. Trendenburg, who is a Co-ordinator, Admissions, Medical Services (Downsview) at the Workers' Compensation Board, is an employee within the meaning of the Act.

Having regard to the evidence and the submissions of the parties and, for the reasons given orally at the hearing, the Tribunal determines that Ms. K. Trendenburg is an employee in a managerial capacity within the meaning of the Act. Accordingly, she is not an employee within the meaning of the Crown Employees Collective Bargaining Act.

DATED at the City of Toronto This 25th day of July, 1985.



Owen B. Shime, Q.C.
for the Tribunal

The Crown Employees Collective Bargaining Act
ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/84/84

BETWEEN:

BRENDA HELEN CURRIE
("the Applicant")

AND:

ONTARIO LIQUOR BOARD EMPLOYEES UNION
("the Respondent Employee Organization")

AND:

LIQUOR CONTROL BOARD OF ONTARIO
("the Respondent Employer")

BEFORE:

Pamela Picher, Chairman, and Tribunal Members
W. Walsh and R. J. Gallivan

**APPEARANCES
AT THE
HEARING:**

Brenda Currie, on her own behalf;
Martin Levinson and Jean Chaykowsky for
the Respondent Employee Organization;
R. M. MacDougall, for the Respondent Employer.

**DATE OF
HEARING:**

November 6th, 1985

DECISION OF THE TRIBUNAL

This is an application which has been filed pursuant to section 16 of the **Crown Employees Collective Bargaining Act**, R.S.O. 1980, c.108. The applicant, Ms. Brenda Currie, seeks an exemption from the payment of dues to the respondent employee organization on the basis of her religious convictions

or belief. Section 16 of the Act provides as follows:

16. (1) The parties to a collective agreement may provide for the payment by the employees of dues or contributions to the employee organization.

(2) Where the Tribunal is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Tribunal shall order that the provisions of the collective agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered as such under Part I of the **Income Tax Act** (Canada) as may be designated by the Tribunal.

(3) No collective agreement shall contain a provision which would require, as, a condition of employment, membership in the employee organization. R.S.O. 1980, c.108, s.16.

The applicant has been employed by the Liquor Control Board of Ontario as a full time employee for three years. On November 12, 1982 she applied for membership in the Ontario Liquor Board Employees Union and authorized the deduction of monthly dues. Ms. Currie testified that at the time she made that authorization she was unaware of section 16 of the Act and, as she put it, did not realize that she had the option of having the money paid to a charitable organization instead.

Ms. Currie stated that God has spoken to her and she believes it is God's will that she give her money to sick children instead of the employee organization. She commented that sick children need all the help they can

get. She further stated, "The good Lord didn't put me here to just look after myself." Ms. Currie gave no further evidence defining her religious beliefs or stating the manner in which or the length of time for which she has practiced her religious convictions or beliefs.

Ms. Currie expressly acknowledged that there is nothing in her religious beliefs that would make it improper for her to give money to the employee organization. She noted that her religion doesn't tell her where to give her money. It is clear from her evidence that she has no religious objection to the employee organization itself, to any of its activities, to any article of its constitution or to any of its stated objects or beliefs. Her religious convictions though cause her to have a stronger concern for sick children than for the employee organization.

It is the Tribunal's conclusion that Ms. Currie's desire to have the money which is currently deducted for union dues given to sick children constitutes a "preference" based on religious conviction or belief but is not an "objection" to the payment of dues within the meaning of section 16 of the Act. The Tribunal is satisfied that to obtain an exemption from the payment of union dues under section 16 of the Act, on the basis of religious objection, there must be something within one's religious beliefs or convictions which is inconsistent or incompatible with the union. For Ms. Currie that is not the situation. Her religion or religious convictions are not incompatible with any aspect of the union. None of the union's aims or activities violate her religious convictions or beliefs. Nor, in fact, in the abstract, does the

payment of dues to the union.

In cases where the Tribunal has granted a religious exemption from the payment of union dues there is a conflict between the applicant's religious beliefs and the union. For example, in **Re Gilmour Ross Anderson and the Civil Service Association of Ontario and the Crown in Right of Ontario (Ministry of Transportation and Communications [August 8, 1974])** (upheld in review by the Divisional Court of Ontario in **Re Civil Service Association of Ontario (Inc.) and Anderson et al, (1975), 9 O.R. (2d) 341**) where the Tribunal allowed the applicant's request for exemption, the applicant objected to paying union dues because he believed, on the basis of his religious convictions, that strikes were morally wrong. His religious beliefs came into direct conflict with the campaign of the employee organization to obtain the right to strike. For him, therefore, giving financial support to the union in the form of dues directly infringed his religious beliefs. That is not the case with Ms. Currie.

Similarly, in **Chaim Forer and OPSEU**, unreported decision of the Tribunal dated April 7, 1983, (overturned by the Divisional Court of Ontario; restored on appeal by the Ontario Court of Appeal, decision dated November 21, 1985), the applicant to whom the Tribunal granted the exemption objected, on the basis of his religious convictions, to the resolution passed by the Ontario Federation of Labour, to which OPSEU belongs, "supporting the terrorist [Palestine Liberation Organization] in its international war against the Jewish people . . ." Mr. Forer asserted that this resolution was "inimical

to every Jew who believes in the God given right to the land of Israel". Again, in contrast to Ms. Currie, Mr. Forer's religious beliefs were in direct conflict with the stated beliefs of the organization to which the Union belonged. (By way of further example, see **Precision Rubber Products (Canada) Limited**, [1982] OLRB Rep. [May] 749 where the successful applicant for a similar religious exemption under the **Labour Relations Act of Ontario**, R.S.O. 1980, c.228 believed that it was contrary to the Bible to engage in the activities of a trade union, particularly strike activities and **Helen Wybenga**, [1976] OLRB Rep. [Aug.] 422 where the successful applicant's religious beliefs and convictions were in direct conflict with numerous activities and principles of the trade union, including, the betterment of working conditions by power, harassment or strike activity.)

At p.6 of the **Re Anderson** decision, the Tribunal noted that the religious exemption provision in the Act "recognizes that individual employees should not be compelled to financially support organizations whose purposes or activities are antithetical to their own religious beliefs." For Ms. Currie, and in contrast to the circumstances in **Re Anderson**, **Re Forer**, **Precision Rubber Products**, or **Helen Wybenga**, the Tribunal is satisfied that paying union dues is not antithetical to her religious beliefs. It is not that it is against her religious beliefs to pay dues to the Union. It is that it promotes her religious beliefs to pay that money to sick children instead.

In **Kathiravet Pillai Ariaratnam and OPSEU and The Crown in Right of Ontario, Ministry of Health**, the Tribunal commented as follows at p.2:

The difficulty in this case is in establishing a "nexus" between [the applicant's] religious conviction and his objection. As indicated, we are not prepared to analyze the logic as to how the applicant has arrived at his particular religious convictions or belief, **nor are we concerned with the logical analysis as to how the applicant relates his objection to payment of union dues.** [Emphasis added]

This passage does not mean that the Tribunal will grant the exemption in the absence of a conflict between one's religion and support of the Union. It means that the Tribunal need not itself be persuaded to the logic between the applicant's religious convictions or belief (which might be a passage from the Bible, for example) and his objection, on that basis, to the Union, and thus support thereof.

Ms. Currie's situation is somewhat similar to the circumstances in **W. Scott Morgan and Ontario Public Service Employees Union**, unreported decision dated November 24, 1977, where the Tribunal disallowed the exemption. In that decision the Tribunal reasoned as follows at pp. 1-2:

There is no doubt that the applicant is a religious person with sincerely held religious beliefs. However he was very honest with this Tribunal and admitted that the object of this application was to divert his Union dues for religious or charitable purposes.

While the applicant's motives may be commendable, the Tribunal cannot ignore its statutory obligation to satisfy itself that the applicant objects to paying Union dues because of his religious convictions. The applicant admitted that he has no objection to Unions or to paying Union dues but he simply prefers to have his Union dues diverted for a purpose that he feels is more worthwhile.

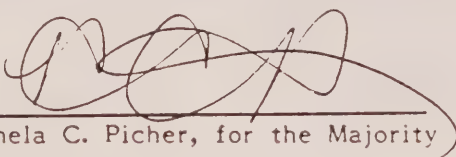
Accordingly, in these particular circumstances and for the reasons given in **Van Harten v. OPSEU**, July 5th, 1976,

unreported, the application is dismissed.

The Tribunal fully commends Ms. Currie's concern for sick children. To exempt Ms. Currie from the payment of dues to the employee organization, however, she must fall within the provisions of section 16 of the Act. For the reasons detailed above and having regard to the principles enunciated in Van Harten v. OPSEU, (July 5, 1976, unreported), it is our conclusion that she does not.

The application is hereby dismissed.

Dated at Toronto this 7th day of January, 1985.



Pamela C. Picher, for the Majority

DISSENT OF EMPLOYER MEMBER:

Very shortly after hearing evidence in Ms. Currie's case the Tribunal had available to it the recent decision of the Ontario Court of Appeal in the case of Chaim Forer v. OPSEU. In that case the Tribunal had granted Mr. Forer his requested exemption from the payment of union dues and, despite union efforts to have the decision overturned, it was upheld by the Court. In its decision the Court quoted from an earlier decision of this Tribunal: Van Harten v. OPSEU and said about that case that "... the Tribunal in Van Harten correctly stated the principles which should govern a decision on an application ..." for exemption from paying union dues.

The principles in the Van Harten case which the Court endorsed may be summarized as follows: -

- the words "religious convictions or belief" in Section 16 of the Act must be considered from the subjective point of view not of the Tribunal but of the applicant;
- the Tribunal must not impose upon the applicant its own or any other a priori view of what is religious;
- the term "religious" need not be construed in the sense that it must be a tenet of a particular religious faith or religious institution;
- the applicant's religious convictions or belief must be sincere and not advanced as a subterfuge to escape the payment of dues;
- the applicant must establish that the objection to paying union dues stems from the applicant's religious convictions or belief; that is there must be some link or tie between the religious convictions and the objection.

Applying those principles to Ms. Currie's case leads me to a conclusion opposite to that of my colleagues. I am satisfied that the Majority has correctly applied the first four of the above noted five principles. The Majority acknowledges that Ms. Currie's application was prompted by her own views which it accepts as religious convictions or belief. Nor is there any question of the

sincerity of her religious beliefs. Ms. Currie's motivations are deeply inspired by a charity for her fellow man which stemmed from an obviously moving personal religious experience in her interior life. She was extensively cross-examined by counsel for the union who was unable to shake her convictions despite such suggestions as that she simply "pull in her belt another notch" so that she might support both the union and sick children without having to give up one or the other. Despite this, there was not the slightest bit of evidence that her motives are other than as claimed.

The tests implicit in the first four principles were thus easily met. Where I disagree with the Majority is in its conclusion that there is insufficient connection between Ms. Currie's beliefs and her request for exemption from union dues to qualify under Section 16. Saying that Ms. Currie's application constitutes a "preference" rather than an "objection" is to give insufficient weight to her testimony. Contrary to the assertion by the Majority that Ms. Currie has no religious objection to the union or its activities, her evidence was that she did not believe the union had her best interests at heart and that by objecting to her application the union was discriminating against the Lord Himself. In her view her religious interests would be served by redirecting her union dues to charity and that by opposing her the union was acting contrary to her religious convictions.

While this connection between her religious beliefs and her application may not be as clear cut as that of an applicant who asserts that the union's support of the Palestine Liberation Organization offends his religious beliefs, or who

believes that harassment and strikes by unions are morally wrong, it is nevertheless a direct link between Ms. Currie's religious beliefs and the forced payment of union dues. Even if such a link is judged by some to be tenuous this Tribunal, which has ample scope for assuring against abuses of the Act, should err on the side of individual rights and freedoms when dealing with applications of this nature.

For these reasons I would allow her application.



R. J. Gallivan

DECISION

This is an application pursuant to Sections 4 and 5 of **The Successor Rights (Crown Transfers) Act R.S.O. 1980, c.489** for a declaration that there has been a transfer of an undertaking from Woodstock Ambulance Limited (referred to as Woodstock) and Thames Valley Ambulance Limited (referred to as Thames Valley) to the Crown.

The Ontario Public Service Employees Union (referred to as OPSEU) was at all material times the bargaining agent for ambulance attendants and ambulance dispatchers employed by Woodstock and Thames Valley.

In the late 1970's the Ministry of Health developed a plan to have a central ambulance dispatch service throughout the province. The dispatching of ambulances until that time had been performed by (i) private ambulance services, (ii) hospitals (iii) municipalities (iv) volunteers and (v) the Ministry of Health. In order to dispatch ambulances a license under **The Ambulance Act** was required. When the Government announced its plan to centralize the dispatch function, conditions were attached to ambulance dispatch license which stated that on notice from the Ministry of Health the holder of the license would be obliged to discontinue the dispatch function.

In the London area the ultimate effect of centralization would be the elimination of a number of licensed dispatch services that had dispatched ambulances at twenty-three different services. In December 1984 the Ministry of Health directed that jobs for its centralized dispatch centre in the London area be posted in the twenty-three dispatch services referred to above. As a result of this posting the Ministry hired three employees of Thames Valley - one of whom had not been a dispatcher but was an ambulance attendant. Three dispatchers from Woodstock applied but none were hired.

On June 3, 1985 the Ministry of Health commenced dispatching services out of its centralized centre for an area outside of London which included Thames Valley, Strathroy, Parkhill, Lucan and Zurich. The dispatch function for those areas had been performed by Thames Valley which ceased to perform those functions on that same date.

Both at Thames Valley and the centralized service the dispatching of an ambulance commences with a telephone call. At Thames Valley the classifying of requests for service was done by a dispatcher. In the centralized system the call is taken by a "call taker" who receives the information while the dispatcher selects the ambulance which is most appropriate for the run.

It is clear from the evidence that the centralized system uses newer and different equipment from the equipment used by Thames Valley and Woodstock. Moreover, there is more extensive equipment used in the centralized system as well as some different procedures. It is also significant that all of the equipment which was used for dispatching by the private ambulance services including the equipment used by municipalities or hospitals was owned by the Ministry of Health.

The relevant provisions of the Crown Transfers Act are as follows:

1. (1)(f) "transfer" means a conveyance, disposition or sale;

(h) "undertaking" means a business, enterprise, institution, program, project, work or a part of any of them.

3. (1) Where an undertaking is transferred from an employer to the Crown and a bargaining agent has a collective agreement with the employer in respect of employees employed in the undertaking, the Crown is bound by the collective agreement as if a party to the collective agreement until the Tribunal declares otherwise.

A number of arguments were made by the parties but at this point we propose to address only two of the arguments in view of the conclusion that we have reached.

At the hearing a great deal of evidence was adduced outlining the changes in equipment and procedures that had occurred when the province assumed the ambulance function. We do not propose to deal at great length with the

evidence and argument advanced. Suffice it to say, there were changes in equipment and procedures. However, the essential functions of receiving a call and dispatching an ambulance remained. There was a dispatch function and it remained. The very essence of that function was to receive a call from persons requiring an ambulance and to send an ambulance where it was needed. That essential function remains; it did not change, and despite the argument of counsel for the employer that there has been a fundamental change in the business, we categorically reject that argument. The most that can be said about the separate situations is that some of the functions performed changed and are different but a change in the functions being performed by employers cannot be equated with a substantial difference in the undertaking within the meaning of section 4 (2) of the **Successor Rights (Crown Transfers) Act**; to all intents and purposes the undertaking is the same i.e. it receives calls and dispatches ambulances.

The more difficult issue in this case is whether there has been a transfer of an undertaking. The employer maintains, 1) that the physical assets of the predecessor undertaking are not used in the new undertaking, 2) that the former managerial skills are not utilized, 3) that there has been no transfer of goodwill or other intangible assets, 4) that the operating personnel and their skills are not necessary to the new operation, and 5) that employees of the alleged transferor who are working for the alleged transferee are not performing the same jobs that they previously performed.

The union argues that the function of dispatching has been transferred to the Crown pursuant to section 3 (1) of the Act and relies on a number of cases decided by the Ontario Labour Relations Board. The Union also argues that there has been a continuation of the work and jobs in question and that there is an obvious relationship between the Ministry of Health which controlled private sector employers dispatching ambulances and the same Ministry which is now performing that function.

It is apparent that the Ministry of Health is now performing a function that was previously performed by the private operators, but the issue in this case is not whether the same function is being performed but whether or not the function has been transferred by the private operators to the Ministry within the meaning of the Act. There is no doubt that the dispatch function constituted an undertaking within the meaning of the Act. The dispatch function is at the very least a part of the business or enterprise of Thames Valley or Woodstock Ambulance.

We are of the view that the Act should be given a liberal interpretation so as to preserve bargaining rights. That is the intent of the statute. Moreover, we are not prepared to rely to any great extent on the legal form in which the transaction takes place. All of the circumstances surrounding the transaction must be assessed in the light of the purpose of the statute in order to effectuate the legislative purpose.

Under the Act "'transfer' means a conveyance, disposition or sale". In this case we must consider whether the circumstances fall within that definition after duly considering the principles which have been expressed. An examination of the circumstances indicates that nothing has been transferred. Thus the licenses which were issued by the Ministry had conditions attached which required them to cease dispatching upon notice from the Ministry. At most the operators had a defeasible right - a right which was subject to being cancelled by The Ministry at any time. That license was not transferred, it was cancelled and accordingly the operators were prohibited from continuing the dispatch business. Moreover, The Ministry was at all material times entitled to provide dispatch services directly pursuant to The Ambulance Act R.S.O. 1980, c.20 and it simply invoked that right at the same time as it cancelled the operators license. Thus the assertion by The Ministry of its right at the same time as the operators right, given by license, ceased, does not in our view constitute a transfer of business within the meaning of The Act - there has not been a "conveyance, disposition, or sale".

Also the equipment used by the private operators has been reclaimed by the Ministry. That equipment belonged to the Ministry and it was stored or reallocated to other private services and forms no part of the new dispatch centre. There has been no conveyance, disposition or sale of that equipment to the Ministry and of course the equipment which was owned by the Ministry was not transferred to them.

And even if we examine the reversion of equipment in the light of the purpose of the Act we are unable to conclude that there has been a transfer. In many instances the utilization of equipment by a transferee either in and of itself or coupled with other indicia that there is a continuation of the business or enterprise is some evidence of a relationship between the predecessor business and successor business but in this case no such inference may be drawn because the equipment used by the private operators is not currently being used by the Ministry at any relevant location so as to enable us to conclude on that ground that there is a continuation of the business.

Further there is no managerial or supervisory continuation as suggested by some of the cases cited. Simply put those responsible for operating the Ministry's service played no part in operating the private services.

But there are some employees who have been hired by the Ministry. In some instances that might indicate the continuation of a business as the result of a transfer. Thus employees in one entity performing the same work that they had formerly performed in a predecessor entity might be some indication that the basic work has been transferred. In this case the Government has hired some of the employees who had formerly worked for the private operators. But that fact alone is not sufficient in the circumstances of this case to tip the balance in favour of a determination that there has been a transfer. Indeed the only continuation of something tangible in the hands of the current employer that had existed in the hands of the private operators is the employment of some of the same employees. But there is nothing else that has been transferred or continued. As a policy matter if that factor was to tip the balance it might cause the Ministry to refuse to hire persons who had worked in the industry for private operators.

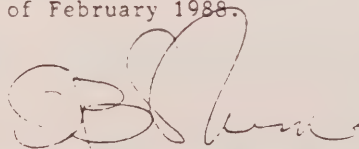
The Ministry claims that the work being performed is substantially different but we have indicated our views about that earlier in these reasons. However, it is apparent and admitted by the union that in the late 1970's the Ministry had developed a plan to centralize the dispatch services throughout the province and to perform those services under the auspices of the Ministry. In anticipation they attached conditions to the licenses issued to private operators. Everyone was aware that the Ministry was going into the business of dispatching

based on a centralized system. In private industry the commencement of a business in competition with an-existing business that does the same work does not, quite obviously indicate a transfer. In this case it appears that the Ministry decided to go into the business of dispatching ambulances. That was an attempt on its part to rationalize the ambulance services. Also since it might be chaotic to operate two services in one area it meant that contemporaneous with the Ministry commencing operations the private operators ceased dispatching ambulances. They did so in accordance with the license requirements; everyone was aware of those conditions. In sum the Ministry's operations began and the private operations ceased operating. There was not a transfer. That the work was of the same basic nature did not, in our view, create a transfer within the meaning of the Act.

Two minor matters remain. First, in one instance the Ministry took over a telephone number. That was a convenience and is not evidence of a transfer. Secondly, there was compensation paid to the dispatcher owners for loss of personal income and did not constitute consideration for the business transfer.

In the result we determine there has not been a transfer of business within the meaning of the Act and the application is dismissed.

DATED in Toronto, Ontario this 10th day of February 1988.

A handwritten signature in dark ink, appearing to read 'O. B. Shime', is written over a horizontal line.

O. B. Shime, Chairman
For the Tribunal

DISSENT

I am dissenting from the decision of the Chairman in this matter because in my opinion it is inconsistent with both a strict and purposive interpretation of the Successor Rights (Crown Transfers) Act.

This legislation was intended to protect the bargaining rights and the negotiated terms and conditions of employment for those employees whose work is transferred from or to the Crown. There was evidence before the Tribunal that several dispatchers working for private operators applied for, but did not receive positions with the Centralized Dispatch Centre when the licence of their Employer was terminated. This is the harm which the Crown Transfers Act was intended to remedy.

To give effect to the purpose of the legislation it is appropriate that its terms be given a broad and liberal interpretation. The relevant provisions of the Crown Transfers Act are as follows:

1.(1)(f) "transfer" means a conveyance, disposition or sale;

(h) "undertaking" means a business, enterprise, institution, program, project, work or a part of any of them.

3.(1) Where an undertaking is transferred from an employer to the Crown and a bargaining agent has a

collective agreement with the employer in respect of employees employed in the undertaking, the Crown is bound by the collective agreement as if a party to the collective agreement until the Tribunal declares otherwise.

The definition of "undertaking" encompasses all possible activities in which the Government might be engaged. The first particular referred to is "business" such as a Crown Corporation. It then lists "enterprise" and "institution" applying to something like a Hospital. The next example of a "undertaking" is a program such as a pre-natal teaching program. The definition then goes on to include "project" such as the reforestation project. The final example of an "undertaking" is "work". This in my view is intended to include the tasks performed in a project, program, institution, etc.. The definition of "undertaking" does not stop there but goes on to include "a part of any of them". The definition of "undertaking" then is intended to include everything undertaken by the Government from something as large as a Crown Corporation to something as miniscule as part of the tasks performed in any Government service. This is the most comprehensive definition possible. It is certainly much more encompassing than the definition of "business" within Section 63 of the Labour Relations Act.

The dispatching of ambulances, in my opinion is an "undertaking" within the meaning of the Act.

The definition of "transfer" is also very comprehensive. Not only does it include "sale" as used in Section 63 of the

Labour Relations Act, it also includes "conveyance" and "disposition". While the words sale and conveyance would seem to require the "transfer" of an asset, whether tangible or intangible I would suggest that the term "disposition" carries with it no such requirement. The chairman's decision is based on his finding that "nothing has been transferred". In my opinion it is not necessary for there to be a "transfer" of an asset or right. It is sufficient if a project, program or work is disposed of; if work is passed from any employer to the Crown this is sufficient in my view to constitute "a transfer under the Act".

If I am wrong in concluding that it is not necessary for something to be transferred, then in the alternative, something has been transferred; the right to dispatch ambulances. This right is one which comes within the jurisdiction of the Ministry of Health. They have the mandate to control this work. They chose to dispose of the right to do this work to operators of private ambulance services by way of licence. It would seem quite evident that, had the Ministry previously performed the dispatch function themselves, and had they transferred this work to private ambulance services by way of licence, this would constitute a transfer under the Crown Transfers Act. On June 3rd, 1985 the Ministry of Health affected a transfer of the right to do the work back to themselves by a cancelling of the licences to the private operators. If the disposition of work to the

private operators is a transfer clearly the reverse must also be a transfer. Indications of a transfer are, the coincidence of the cessation of the work by the private operators and the commencement of the work by the Ministry of Health with no interruption in service, the identity of the service being performed for the public and the use of such things as the telephone numbers previously used by the private operators.

As a result of the cancellation of the licence issued by the Ministry the right to operate a dispatch service was disposed of by the private operators; the work in question went directly back to the Ministry of Health who commenced the service. This constitutes the transfer of an undertaking within the meaning of the Crown Transfers Act.

In a recent decision by the Ontario Labour Relations Board in the KBM Forestry Consultants Inc. [1987] O.L.R.B. Rep. March, 399. The Ministry of Natural Resources subcontracted out to a private operator certain of the work involved in the harvesting of seedlings for transplanting for a reforestation program. The work in question had previously been performed by Ministry employees and the Ministry decided to subcontract the work out to a private operator who provided most of the supervisory personnel, the major equipment and the work force. The Ministry did provide certain of the supplies needed to complete the work. The Board found there was no difference between the work

previously done by the Ministry and subsequently by the subcontractor.

The Board in finding that this did constitute a transfer of an undertaking under the Crown Transfers Act made a comparison between the provisions of that Act and Section 63 of the Labour Relations Act. The Board noted that the former Act applied at least to all the circumstances covered by Section 63 of the Labour Relations Act and that:

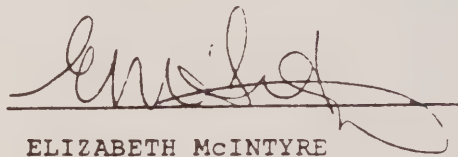
"Section 2 of the Crown Transfers Act is not limited by (the Board's) interpretation of Section 63 of the Labour Relations Act but must be given a broad interpretation (a general principle also applied to Section 63) which takes into account the extensive definition of "undertaking". For example, in our view, it does not require the transfer of physical assets as suggested by Counsel for KBM, nor does the length of the contract affect whether it is a "transfer", suggested by Counsel for the Crown. Underlying the legislation is the recognition (a recognition also underlying Section 63 of the Labour Relations Act) that "the continuity of the work performed before and after the transfer [is of "particular significance"], since the trade union is certified to represent certain work groups, the Collective Agreement regulates the conditions of work for employees in those groups, and the purpose of Section 63 is to preserve both the bargaining relationship and the Collective Agreement.....

In that case the Labour Board went on to find that what had been transferred was part of a project and that there had been a transfer even though there had been no transfer of assets.

The vast majority of the work done in the public sector is of a service nature and the transfer of this work could very frequently be accomplished without the transfer of any "thing".

That which is transferred is the right to do the work. In this case the disposition initially was made by licence. If the Ministry had wished to transfer the right from one private operator to another that could have been accomplished by the transfer of licence. Because the Ministry itself does not need a licence to operate they can transfer the work merely by cancellation of a licence. This technicality should not have any impact on the outcome of the case.

The purpose of the legislation is to preserve bargaining rights when undertakings are transferred to or from the Crown. Given the sweeping definitions of the Act and the substantial identity of the work being performed for the successive Employers in this case, it is in my opinion a situation which the Crown Transfers Act was intended to cover.

A handwritten signature in dark ink, appearing to read 'Elizabeth McIntyre', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

ELIZABETH McINTYRE

SUPREME COURT OF ONTARIODIVISIONAL COURTOSLER, REID and CAMPBELL JJ.

IN THE MATTER OF an Application)	
for Judicial Review pursuant)	
to the Judicial Review)	
Procedure Act, R.S.O. 1980,)	
c.224;)	
	)	<u>Chris G. Paliare</u>
AND IN THE MATTER OF the	)	<u>and C. Dassios</u>
Successor Rights (Crown	)	for applicant
Transfers) Act, R.S.O. 1980,)	
c.489	)	<u>Ms. L.M. McIntosh</u>
	)	for the Crown in
B E T W E E N :	)	Right of Ontario, respondent
)	
ONTARIO PUBLIC SERVICE EMPLOYEES	)	<u>D.J.M. Brown Q.C.</u>
UNION	)	for Ontario Public Service
	)	Labour Relations Tribunal,
Applicant	)	respondent
)	
-and-)	
)	
THE CROWN IN RIGHT OF ONTARIO,)	
as represented by the MINISTRY)	
OF HEALTH, WOODSTOCK AMBULANCE)	
LIMITED, THAMES VALLEY AMBULANCE)	
LIMITED and THE ONTARIO PUBLIC)	
SERVICE LABOUR RELATIONS)	
TRIBUNAL)	
)	
Respondents)	

ENDORSEMENT

The Ontario Public Service Labour Relations Tribunal, in response to an application by the present applicant trade union, determined that there had

not been a transfer of an undertaking from an employer to the Crown in the case of the assumption of ambulance dispatching functions by the Ministry of Health, which functions had formerly been performed by the respondent companies. We are asked to quash that decision. "Transfer" and "undertaking" are carefully defined words in the relevant legislation, the Successor Rights (Crown Transfers) Act. The Tribunal set out and carefully analyzed those definitions in the context of the statute, the cases decided by the Tribunal and cases decided by the Ontario Labour Relations Board. They gave careful consideration to the factual elements that bore on the legal questions before them and they decided the question by finding that there was an undertaking involved but that nothing had been transferred. The very question as to "whether an undertaking has been transferred from an employer to the Crown" is stated by s.11 of the statute to be one for final and conclusive determination by the Tribunal. We are thus limited to the consideration of whether the Tribunal has, in answering that question, reached a "patently unreasonable" conclusion which could not "be rationally supported on a construction which the relevant legislation may reasonably be considered to bear." Mr. Paliare, on behalf of the

applicant, in a forceful argument put forward alternate interpretations of much attraction. While we might ourselves have adopted an interpretation different from that reached by the Tribunal, that is not our function. We are unable to say the Tribunal's interpretation was "patently unreasonable" and we must accordingly dismiss the application. Unless representations to the contrary are made in writing within seven days hereof, there shall be no costs of this application.

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The Crown Employees Collective Bargaining Act
ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/88/84

B e t w e e n :

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by
The Ministry of Consumer and Commercial Relations
and
The Residential Tenancy Commission

Respondents

D E C I S I O N

1. This is an application for certification in which a pre-hearing representation vote has been taken.

2. Pursuant to a joint request of the parties set out in a letter to the Tribunal dated September 20, 1985, the Tribunal, having satisfied itself that all necessary steps to this point in the proceeding have been taken, directs that the ballot box be opened and that the ballots of persons falling within the bargaining unit agreed to by the parties be counted. The ballots of the persons whose inclusion in the bargaining unit has been challenged by either of the parties shall remain segregated and uncounted, pending a final determination of their status.

3. The matter is referred to the Registrar.

DATED at Toronto, this 3rd day of October, 1985.

"Pamela Picher"
Vice Chairman

The Crown Employees Collective Bargaining Act

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/88/84

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

("the Applicant")

AND:

THE CROWN IN RIGHT OF ONTARIO AS
REPRESENTED BY THE MINISTRY OF CONSUMER
AND COMMERCIAL RELATIONS and
THE RESIDENTIAL TENANCY COMMISSION

("the Respondents")

I N T E R I M D E C I S I O N

1. This is an application for certification in which a pre-hearing representation vote was taken in June of 1985.
2. By a letter to the Tribunal dated September 20, 1985, the parties informed the Tribunal that, subject to a number of challenged individuals, they had come to agreement on the bargaining unit description. Pursuant to section 5(4) of the Act and having regard to the agreement of the parties, the Tribunal finds that the following, at a minimum, constitutes a unit of employees appropriate for collective bargaining:

All full-time employees of the Residential Tenancy Commission other than those who are not employees within the meaning of clause F of subsection 1 of section 1 of the Crown Employees Collective Bargaining Act.

For the purposes of clarity, the following are not employees within the meaning of clause F of sub-section 1 of section 1 of the Crown Employees Collective Bargaining Act.

Chief Tenancy Commissioner;
Chief Financial and Planning Officer;
Senior Legal Counsel;
Secretaries to the foregoing positions;
Registrar of Appeal/Legal Counsel;
Special Assistant to Chief Tenancy Commissioner;
Regional Commissioners;
Managing Commissioners;
Commissioners;
Appeal Commissioners;
Secretary to Board and Legal counsel;
Legal Counsel, Investigation and Prosecution;
Manager, Planning, Administration and Control;
Customer Relations Officer;
Co-ordinator, Technical Services;
Co-ordinator, Advisory Services;
Secretary (Planning, Administration and Control);
Supervisor, Administration and Budgeting;
Personnel Clerk;
Administrative Assistant to the Regional Commissioners;
Administrative Assistant, Etobicoke;
Administrative Assistant, Hamilton;
Administrative Assistant, Kitchener;
Administrative Assistant, North York;
Administrative Assistant, St. Catharines;
Administrative Assistant, Toronto, City;
Administrative Officer, Mississauga;
Secretary to the Managing Commissioner, East York;
Secretary to the Managing Commissioner, Kingston;
Secretary to the Managing Commissioner, London;
Secretary to the Managing Commissioner, Ottawa;
Secretary to the Managing Commissioner, Oshawa;
Secretary to the Managing Commissioner, Timmins;
Bilingual Hearing Secretary, North Bay;
Bilingual Hearing Secretary, Sudbury;
Review Officer, Review Services, Owen Sound;
Review Officer, Scarborough.

3. The status of ten persons remains in dispute. The respondent maintains that seven co-ordinators should be excluded from the bargaining unit pursuant to the provisions of section (1)(1)(f)(iii) of the Act on the grounds that they are employed in a managerial capacity. They are:

1. R. S. Owens, Co-ordinator
2. J. F. Babineau, Co-ordinator
3. R. H. Dirnberger, Co-ordinator
4. R. D. Arsenault, Co-ordinator
5. J. A. Anderson, Co-ordinator
6. K. Watson, Co-ordinator, Statistical Services
7. G. Felice, Co-ordinator, Office Services

The respondent further submits that the following two persons should be excluded from the bargaining unit on the grounds that they are employed in a confidential capacity within the meaning of section (1)(1)(f)(iii) of the Act:

1. J. A. Hunt, Secretary
2. D. C. Zafred, Administrative Assistant

Finally the respondent argues that K. Wilcox, Investigator should be excluded from the bargaining unit pursuant to the provisions of section 1(1)(1)(viii) of the Act.

4. Following the taking of the representation vote, the Tribunal determined, pursuant to section 5(4) of the Act, that whether the ten challenged persons were included in or excluded from the bargaining unit, not less than 35 per cent of the employees in the bargaining unit were members of the employee organization at the time the application was made.


5. Through a decision in this matter dated October 3, 1985, the Tribunal then directed, on the agreement of the parties, that the ballot box be opened and the ballots of the persons falling within the bargaining unit agreed to by the parties be counted. The Tribunal further directed that the ballots of the ten persons in dispute would remain, for the time being, segregated and uncounted.

6. Following the counting of the ballots, neither party submitted a request to make representations concerning the accuracy of the report of the Returning Officer, within the time designated for so doing. On counting the ballots, the Tribunal concludes that whether the ten challenged persons are ultimately included in or excluded from the bargaining unit, more than 50 per cent of the ballots cast in the representation vote were cast in favour of the employee organization. Accordingly, having regard to the provisions of section 4(2) of the Act, the Tribunal shall grant representation rights to the employee organization as the bargaining agent of the employees in the bargaining unit.

7. The final bargaining unit description, however, must await the Tribunal's final determination of the status of the ten persons remaining in dispute. A hearing to determine the employee status of those individuals will be scheduled forthwith.

8. The matter is referred to the Registrar.

Dated at Toronto this 15th day of November, 1985.



Pamela C. Picher, Vice-Chairman



